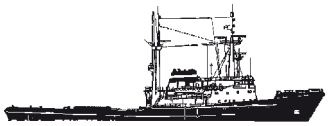

Chapter 7:
Salvage[1]

1 For general reference works on the subject of salvage, see Kennedy *The Law of Salvage* 5th Edition, 1985; Brice *Maritime Law of Salvage* 2nd Edition, 1993; Vincenzini *International Salvage Law 1992*; Hill *Maritime Law* 4th Edition, 1995 Chapter 7 at 313 *et seq*; Chorley and Giles *Shipping Law* 8th Edition, 1987 Chapter 24 at 427 *et seq*. For South African law of salvage, but before the 1989 International Convention on Salvage, see Bamford *The Law of Shipping and Carriage in South Africa* 3rd Edition, Chapter 7; Van Niekerk *An Introduction to the South Africa Law of Salvage, Towage & General Average* (UNISA Special Publication, 1985). The *locus classicus* salvage chronicle is Farley Mowat's *The Serpent's Coil*, Pub Seal Books, 1961, out of print but available through <*www.amazon.com*>.

§7-1 The history of salvage and its law

The South African coastline is long and foul. Over the centuries, since mariners first attempted to circumnavigate Africa in their quest for the riches of the East, many ships have come to grief on its shores. The Cape of Good Hope, and Cape Agulhas at the southernmost tip of the African continent, are notorious among seafarers the world over. It is hardly surprising therefore that the South African coastline has seen regular and sometimes spectacular feats of salvage. And for nearly 30 years, there has been a continuous presence of salvage tugs on station in South African ports, ready to put to sea in any emergency, particularly where there is a threat of oil pollution.[2]

Maritime salvage is a truly ancient concept. In 460 BC, the Greek historian Heroditus wrote of Xerxes hiring Scyllias, a diver, to salvage treasure from Persian vessels wrecked off Mount Pelion.[3] A millenium later, the islanders of Rhodes recorded a scale of salvage rewards directly proportionate to the depths from which goods were salvaged. The surviving Rhodian law of salvage, *circa* the 8th century, reads:

> 'If a ship is capsized or is lost at sea, whoever saves anything out of it shall receive a fifth portion of it as compensation for the salvage. If gold or silver are raised from the bottom of the sea at eight fathoms depth, the salvor shall receive one third. If at fifteen fathoms, he shall receive one half. In case property is cast ashore and found within a distance of one cubit, the salvor shall receive one tenth part of the goods salved.'[4]

2 Since the early 1970s the South African government has subsidised the presence of one of the two locally owned deep-sea salvage tugs on the South African seaboard at all times. In this respect South Africa has led the world in taking a proactive stance to avert maritime disasters. The two South African tugs, the *John Ross* and the *Wolraad Woltemade*, each with main engines delivering 19 200 bhp, were at one stage the world's most powerful salvage tugs. For the tug's details, see the website of their owners, Pentow Marine <*www.marine-salvage.com/pentow.htm*>. After the loss of the *Braer* off the Shetland Islands in 1993, and upon the recommendations of the Donaldson Report *Safer Ships, Cleaner Seas,* the British government adopted a similar attitude in sponsoring the permanent stationing of 'Emergency Towing Vessels' (ETV's) in British waters. The Dutch and German administrations have followed suit, and the French navy has a contract for the employment of two tugs to remain on station on the French coast. See the paper of Hoddinott *Development of the UK Coastguard Emergency Towing Vessel* presented to the 15th International Tug and Salvage Convention, November 1998. Capt Hoddinott notes that in the four winters since ETV's were introduced, five major incidents in Europe have been averted as a direct result of ETV preparedness.

3 *Heroditus* (484–424 BC) *The History*, translated by Littlebury (1720). It seems that Scyllias' salvage contract was somewhat loose, because he abandoned the salvage during the operation and swam back to his Greek fellows.

4 *The Ecloga* Chap XXXVII, attributed to the 8th century AD. See further, §1-2, fn 23. The later Rhodian Law dealt extensively with salvage in Chapters XLV – XLVII. See Sanborn *Origins of the Early English Maritime and Commercial Law,* 1930 (Reprint by Professional Books Ltd, 1989) at 38/9. Salvage is dealt with also in the *Consols de la Mar* re-stated in the *Black Book of the Admiralty* Vol III at 611–631, upon which see §1-2. For a short summary of historical origins of salvage, see also *Brice, op cit,* at §1-10.

The roots of salvage in South Africa's own comparatively short historical context, also run deep. The first documented instance of salvage in South Africa was an entry in the journal of the Dutch pioneer settler at the Cape, *Jan Van Riebeeck,* on 17 April 1656:

> 'During the night the cable of the *Olifant* broke as a result of the carelessness of the watchmen, and the vessel drifted close to the sand dunes of the Lion's Rump. Fortunately she missed the numerous rocks and got onto a sand bank, not without danger of being wrecked as she was hitting the bottom somewhat; but as she had missed the rocks … she was got off on the morning of the 18th with the aid of all available and after great effort, and brought to where the other ships were anchored. Not the slightest leakage or other damage had been caused by the grounding. … Almighty God be praised for the safety of the said ship.'[5]

Little did *Van Riebeeck* know that his journal entry for that stormy day at the Cape so many centuries ago had the makings of a fine definition of salvage: a salvage service rendered to maritime property, danger to salved vessel, a stout effort by salvors, eventual success and a salved fund. Had the salvors of the *Olifant* sought a reward, they would doubtless have found support in the Dutch laws of the time. For the Dutch institutional writers of Roman-Dutch law in the 17th century recorded a developed salvage law, already showing some of the general principles of today's traditional salvage law.[6] By far the most important time in the history of salvage law however, was to follow in the 19th century, largely as a consequence of the industrial revolution in Europe, and more particularly because of the development of the steam tug in the early part of that century. For the first time in history, coastal and later blue-water salvage could be undertaken without dependance upon either a favourable wind or a strong arm at the oar. The coal-fired steam tug changed the face of salvage and towage forever.[7]

5 The following Roman-Dutch writers have covered salvage law to a greater or lesser extent in the passages indicated: *Grotius* 2.4.36; 3.29.4; 3.29.10-14. *Huber* Decis Fris. 1-10; 3.44. *Van Leeuwen* 2.3.8 & 9. (and generally on wreck and abandonment *Censura Forensis* 3.9. and 1.4.29). *Groenewegen* II .18; *Van der Keessel* 193.8; 784-795; *Van der Linden* 4.5; *Voet* 14.2; 41.1.9; 47.9. By reason of s 6 of the Admiralty Jurisdiction Regulation Act, however, Roman-Dutch law of salvage has been displaced by English law and international convention. See further, §7-2.

6 The following Roman-Dutch writers have covered salvage law to a greater or lesser extent in the passages indicated: *Grotius* 2.4.36; 3.29.4; 3.29.10-14. *Huber* Decis Fris. 1-10; 3.44. *Van Leeuwen* 2.3.8 & 9. (and generally on wreck and abandonment *Censura Forensis* 3.9. and 1.4.29). *Groenewegen* II .18; *Van der Keessel* 193.8; 784-795; *Van der Linden* 4.5; *Voet* 14.2; 41.1.9; 47.9. By reason of s 6 of the Admiralty Jurisdiction Regulation Act, however, Roman-Dutch law of salvage has been displaced by English law and international convention. See further, §7-2.

7 That the Admiralty Court was greatly impressed by the advent of steam, and the salvage capability it unleashed is apparent from the comments of Dr Lushington in *The Kingalock* 164 ER 153 at 155:

> 'The principle I have always endeavoured to follow is this, that when steamers render salvage service they are entitled to a greater reward than any other set of salvors who render the same service; and for this plain and obvious reason: in consequence of the power they possess, they can perform such services with infinitely greater celerity than other vessels, with infinitely greater safety to the vessel in danger, and frequently under circumstances in which no other assistance could by possibility prevail.'

It was largely during this time that the English Admiralty Court formulated laws of salvage so comprehensive and sensible, that they were to stand unchallenged, and largely unaltered, until the advent of the tanker phenomenon in the 1960s.[8] The most important period, from a salvage perspective, was between 1838 and 1868, when the legendary Dr Lushington was President of the Admiralty Court.[9] One may safely surmise that many of Dr Lushington's salvage principles became so widely accepted as to have acquired the status of international customary maritime law.[10] His judgments (and all those of the Admiralty Court) were appealable only direct to the Judicial Committee of the House of Lords, which seldom disturbed his findings, especially those which related to fact. In *The Julia*,[11] Lord Kingsdown remarked:

> 'But in these cases of appeal from the Admiralty Court, when the question is one of seamanship, where it is necessary to determine, not only what was done or omitted, but what would be the effect of what was done or omitted, and how far, under the circumstances, the course pursued was proper or improper, their Lordships can have but slender means of forming an opinion for themselves, and certainly cannot have better means of forming an opinion than the Judge of the Admiralty Court. They do not speak with reference to the distinguished person who now fills, and has so long filled, that office, though it would be impossible to imagine a stronger example of the truth of the remark.'

Dr Lushington was succeeded as President of the Admiralty Court by Lord Phillimore. In their hands, the law of salvage (and of towage and pilotage) was all but fully fashioned by the end of the 19th century. South Africa, by then a British colony, adopted these sound salvage tenets of the English Admiralty Court, to the extent that in the relatively few reported court decisions dealing

8 We shall see in §7-6 that the environmental threat of the VLCC gave rise to the necessity for a change in some of the basic principles of salvage, notably the 'no-cure-no-pay' principle.

9 For an account of the life and works of this most remarkable incumbent of the Admiralty bench, see Waddams *Dr Lushington's Contribution to the Law of Salvage* Feb [1989] LMCQ 59-80. Dr Lushington was President of the Admiralty Court in the halcyon days of the development of steam. More than any judge before him, and probably more also than any since, Dr Lushington moulded the laws of salvage, towage and pilotage. He was both a civilian and a common law lawyer. Pragmatic, often to an extreme, he favoured proceedings which were 'summary, expeditious and inexpensive' (*The Harriot* (1842) 1 W Rob 439 at 447). He did not take kindly to matters being over-complicated:

> 'The Court has much to lament in this case. It has to lament, whatever may be its ultimate decision, that a case, where the amount involved is so exceedingly small should have been brought before this jurisdiction. It has to lament the great multitude of affidavits which have been made on both sides; and it views with great sorrow the contradiction that prevails between them.' (*The Medora* (1853) 164 ER 10).

From 1841 to 1866, 2 653 salvage cases were brought before the Admiralty Court, with about 750 reaching decision. Dr Lushington delivered most of these decisions, and some 250 of his judgments are reported. The total number of admiralty cases during this period was just short of 10 000.

10 Indeed many of the basic principles of the International Convention on Salvage, 1989 and its predecessor, the Brussels Convention of 1910 are restatements of Dr Lushington's principles.

11 *The Julia* (1861) 15 ER 284.

with salvage heard in South Africa to date, English law has been uniformly applied without an apparent need to justify doing so.[12] It is only in relation to aspects of salvage which relate to wreck that the Roman-Dutch law has held its ground.[13]

It is perhaps interesting to reflect that prior to the 19th century, English law seemed more preoccupied with awarding prize for seizing foreign vessels, and with the infamous Cornishmen wrecking rather than salvaging. The wreckers left little for salvors, who would have incurred no thanks and scant reward for plying their altruistic trade in English waters. And the Crown jealously guarded its share of what chance and the wreckers deposited on its shores. One of the earliest salvage and wreck decisions on record is that of *Sir Henry Constable's Case*,[14] which defined the terms flotsam, jetsam and lagan. A number of cases of the time, with names redolent of the spirit in which they were no doubt fought – such as *R v 49 Casks of Brandy*[15] – reflect the Crown's determination to claim its share of the spoils, often in the face of competition from the local lords. The first purposeful British salvage legislation was enacted in 1353 by Edward III,[16] giving the Crown the right to wreck found on the high seas, but, clearly pandering to the wreckers, still leaving wreck washed ashore to the jurisdiction of the 'local authorities'. 'Whisky galore'[17] continued well into the 18th century until in 1753 George II made it a felony to put out false beacons and also to 'beat wound or obstruct people trying to escape from foundering vessels'.[18] Similar legislation followed in 1809 when the Crown outlawed the wreckers' barbaric practice of 'cutting of ship's cables in harbours, bays and rivers'.[19]

By the 19th century, the bulk of the financial brunt of the wrecker's exploits was being borne by Lloyd's underwriters, who had by then operated in concert for nearly 200 years.[20] From their

12 There are fewer than 40 salvage decisions reported in the South African law reports to date.

13 See Chapter 4 and particularly §4-1.

14 *Constable v Gamble* (1601) 77 ER 218. Flotsam is that which is found floating at sea, jetsam is that thrown overboard, and lagan is cargo which is lost overboard and buoyed for future recovery.

15 *R v 49 Casks of Brandy* (1836) 3 Hagg 251.

16 27 Edw III c 13.

17 In Compton McKenzie's *Whisky Galore*, 1947, the wreck of the *SS Cabinet Minister* provided welcome relief for the 'drought' suffered by crofters of Little Todday owing to a lack of whisky during the Second World War:

> "A Dhia, there's six hundred thousand bottles where this came from." said Hugh. … Jockey agreed, in his voice a boundless content. … "We'll chust be saying three Hail Marys, Hugh." "Ay," the other agreed, "for favours received."

18 26 Geo II c 19.

19 49 Geo III c 122. This was only one of the nefarious, and at times murderous practices of the wreckers of the time.

20 See §19-1 for a short history of Lloyd's of London. The interests of the insurer in relation to salvage had already long been recognised. In *The Fusilier* (1865) Br & Lush 341 at 347 Dr Lushington commented:

perspective, encouragement had to be given to mariners to save ships and cargoes in danger, rather than to speed them on their way to total loss for the benefit of wreckers. Insurance began to put the brakes on wrecking. The first 'Lloyd's Form' (though not yet thus named) was contracted for a salvage operation in the Dardanelles, under the auspices of the Committee of Lloyd's in 1890, with the salvor agreeing to abide by the award given him by the Committee of Lloyd's upon 'preservation of some part of the property in peril'. The Lloyd's Open Form ('LOF') was born.

The law of salvage, by then crystallised by the Admiralty Court in the hands of the likes of Dr Lushington and Lord Phillimore, was broad enough to recognise the incentive to salvage provided by a formal contract of salvage after the event, which could comfortably be accommodated within existing legal principles. The Lloyd's Form was soon to become the standard contract for much of the world's salvage. The influence of Lloyd's, and the arbitration practice it evolved to deal with salvage disputes, coupled with the developed English law of salvage, ensured that by the dawn of the 20th century, the British had provided the maritime world with a workable, and to a large extent international, customary maritime law of salvage.[21]

§7-2 Applicable Law

Salvage is an international concept, usually affecting multinational interests and dealing with an ever evolving sophistication of technology both in relation to the salvor and the risks to be salvaged. The law needs to keep pace with the demands of the industry.[22] Present South African salvage law has achieved a balance of traditional salvage law inherited from England, and the broadly accepted principles of the International Convention on Salvage, 1989. This balance is largely reinforced by the Wreck and Salvage Act, 1996.[23]

> 'All owners of ships and cargoes and all underwriters are interested in the great principle of adequate remuneration being paid for salvage services; and none are more interested than the underwriters of cargo.'

21 The English law of salvage formed the basis of the law in the United States. See *The Sabine* (1879) 101 US 384. Professor Schoenbaum comments (Schoenbaum *Admiralty and Maritime law*, 2nd Edition 1994 at §16-1) that 'the general maritime laws of salvage can be considered as a part of the *jus gentium*, customary international law'.

22 Writing of how the traditional salvage concepts of the 1910 Brussels Convention had been outgrown, the CMI reported in 1984:

> 'Since the 1910 Convention was formulated the technical and economic development in international shipping has, of course been very significant. The dangers to ship and cargo have been reduced while the dangers which ship and cargo represent *vis-a-vis* third party interests, in particular relating to the environment, have substantially increased. The values of ship and cargo have increased drastically resulting in a heavy concentration of risks on fewer keels. To the professional salvors this means fewer, but more valuable opportunities. Salvage techniques have improved substantially, but have become far more capital intensive. This has had a certain adverse effect on the ready availability of adequate salvage equipment along the sea routes of the world.'

23 Act 94 of 1996. See further §7-2.2.

§7-2.1 Section 6 of the Admiralty Jurisdiction Regulation Act, 1983

Salvage is a 'maritime claim' defined as such by s 1(i)(k) of the Admiralty Jurisdiction Regulation Act, 1983:

> 'any claim for or in the nature of salvage, including any claim relating to the sharing or apportionment of salvage and any claim by any person having a right in respect of property salved or which would, but for the negligence or default of the salvor or would-be salvor, have been saved.'[24]

As maritime claims, salvage disputes fall to be adjudicated by the High Court in the exercise of its Admiralty jurisdiction. In such disputes, the law to be applied is determined by the ubiquitous instrument of compromise, s 6. Salvage of all ships, wherever they may have been salvaged, was covered by the jurisdiction of the 1840 English Admiralty Court Act (in s 6 of that Act):[25]

> '[T]he High Court of Admiralty shall have jurisdiction to determine all claims and demands whatsoever, in the nature of salvage for services rendered, or damage received, by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel; and to enforce payment thereof, whether such ship or vessel may have been within the body of a county or upon the high sea at the time when the services were rendered, or the damage received, or the necessaries furnished, in respect of which such claim is made.'

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24 A salvage claim would also be covered as a maritime lien claim under ss (y).

25 Admiralty Court Act, 1840 (3 & 4 Vict c 69). In *The Ocean* (1845) 166 ER 793 Dr Lushington was required to decide upon the scope of s 6 of the 1840 Act in relation particularly to necessaries, but, in so doing, also referred to salvage. Dr Lushington ruled that this section extended the then Admiralty jurisdiction to all ships, British or foreign, but only in relation to salvage, damages and towage (thereby distinguishing the effect of the section in relation to necessaries claims):

> 'From these words it would seem, that the former portion of this section is intended to refer generally to all 'ships or sea-going vessels', whilst the latter is to receive a more limited construction, and is to be confined exclusively to foreign vessels. The intention of the Legislature in thus framing the section is, I conceive, obvious upon the face of it. Before the statute was passed, all claims for salvage, and all questions of damage, as also all demands for towage services, when the transaction took place within the body of a county, were cognisable in the Courts of Common Law alone: if this Court had proceeded to adjudicate in the matter, it would have been subjected to a prohibition. For the convenience of parties who might so render services or receive a damage, it was deemed expedient to restore the ancient jurisdiction of the Court of Admiralty, and in so doing to give the option of proceeding by the more summary process of this Court instead of compelling an action at law.'

Dr Lushington ruled further that the section had a more limited effect in relation to necessaries:

> 'With respect to "necessaries supplied to any foreign ship or sea-going vessel", these, I have already stated, are confined exclusively to foreign vessels; and the intention of the Legislature in making the provision was, to remedy great inconveniences which had formerly occurred in cases of foreign vessels driven by stress of weather upon the coasts of this country. In such cases, it often happened that the master had no credit, and great difficulties were experienced in providing the requisite repairs, and in obtaining a supply of necessaries for the further prosecution of the voyage.'

Accordingly, and subject to any applicable South African statute and to any choice of law recognised in terms of s 6(5) of the Admiralty Jurisdiction Regulation Act, English law as at 1 November 1983 would apply to salvage disputes heard in South Africa today. British cases and developments in the law of salvage since 1983 would be merely persuasive. And Roman-Dutch Law would have no application except in relation to aspects of wreck.[26]

§7-2.2 *The Wreck and Salvage Act, 1997 and the International Convention on Salvage, 1989*

In order to bring South African salvage law into line with the 'uniform international rules regarding salvage operations' to which the 1989 International Convention on Salvage aspires,[27] and in so doing to enact the provisions the Salvage Convention, South Africa has enacted the Wreck and Salvage Act, 94 of 1996, which came into effect on 1 February 1997. The Act consolidates all of the erstwhile Merchant Shipping Act provisions relating to wreck and salvage, and includes as a Schedule the full text of the Salvage Convention, which is given the force of law.[28] The Wreck and Salvage Act is therefore the South African lawyer's first port of call when seeking the law of salvage. Neither the Act nor the Convention which forms the major part of it, is however a complete and exclusive compendium of the law of salvage. To the extent that the Act and the Convention are silent upon any point of law, and particularly in relation to the interpretation of terms of art used in the Convention which the Convention itself does not define, recourse should be had to the common law of salvage. For this reason, the traditional law of salvage, not only provided the fabric from which the Salvage Convention was fashioned, but it remains relevant, to the extent that it is not amended by the Convention.[29]

26 For a discussion on the application of English law per s 6, see §1-7. South African case law which developed up to 1983 is now only persuasive. Deciding which case law – English or South African – should apply upon principles of *stare decisis* is and particularly complex. Since 1961, the Admiralty sitting of the High Court has been totally indigenous. Anomalously, it is thus arguable that decisions from 1961 to 1983 in South Africa would have only a persuasive effect, not being in any way part of the English law which s 6 imports, and that even decisions of South Africa's own courts after 1983 would also be persuasive at best. Where English law is silent on any particular point, the obscure reservation of s 6 could have an effect: 'insofar as that law can be applied'. For if there is no English law upon an issue, Roman-Dutch Law would still be the fall-back regime.

27 The stated object of the preamble to the Convention, referred to hereafter as 'The Salvage Convention'.

28 The Convention was neither acceded to nor ratified by the South African government because it was considered that the Convention was lacking in certain respects, particularly in relation to its application and to the calculation of Art 14 special compensation. See further §7-8. The evolution of salvage law in the direction of the 1989 Convention will be considered in §7-6, and the terms of the Convention will be discussed when dealing with the general principles of salvage in §7-4.

29 See for example *Brice, op cit* at §1-57: 'It is submitted that, in addition, its [a State Party to the Convention] domestic laws may probably add to the rights contained in the Convention, provided that in so doing it does not conflict with the Convention.' And cf Gaskell *The Enactment of the 1989 Salvage Convention in English Law: Policy Issues* [1990] LMCLQ 352-363. See also Brice *The New Salvage Convention: Green Seas and Grey Areas* [1990] LMCLQ 32-63.

In this chapter therefore, we shall look at salvage through its established and traditional general legal principles, at the same time cross-referencing to the Act and the Convention to see the extent to which either depends upon or affects the other. We shall see that the Convention is largely a re-statement of the traditional common law of salvage, except to the extent that it caters for rewarding efforts to protect against environmental damage, in which respect it varies from that traditional law. Let us, however, first pause briefly to examine some of the formal provisions of the Wreck and Salvage Act.

§7-2.2.1 Definitions

The Act defines[30] a 'ship' as:

> 'any vessel used or capable of being used on any waters, and includes any hovercraft, power boat, yacht, fishing boat, submarine vessel, barge, crane barge, crane, dock, oil or other rig, mooring installation or similar installation, whether floating or fixed to the sea-bed and whether self-propelled or not',

and a South African ship is one registered or deemed to registered in South Africa.

'Wreck' is defined as including:

> 'any flotsam, jetsam, lagan or derelict, any portion of a ship or aircraft lost, abandoned, stranded or in distress, any portion of the cargo, stores or equipment of any such ship or aircraft and any portion of the personal property on board such ship or aircraft when it was lost, abandoned, stranded or in distress.'

§7-2.2.2 Application and interpretation of the International Convention on Salvage, 1989

Section 2(1) of the Act gives the Convention the force of law in South Africa.[31] In interpreting the Convention, a South African court or tribunal is given the liberty to 'consider the preparatory texts to the Convention, decisions of foreign courts and any publication'. The *travaux preparatoires* of the Convention would be a valid source in interpretation, as would not only foreign judgments delivered after the Convention, but also those on similar notions or terms predating the Convention. This provision of the Act leaves the door open to traditional salvage law.[32] Allowing recourse to foreign judgments generally, and not especially to those of England, is a step in the right direction in lifting the stultifying mantle of s 6 of the Admiralty Jurisdiction Regulation Act.

30 Wreck and Salvage Act, s 1.

31 Including the Memorandum on Understanding relating to Arts 13 and 14 which are Attachment 1 to the Convention.

32 See *Brice, op cit* §1-38 at 15, and see the comments in §13-5 in relation to the *travaux preparatoires* of the Hague Rules.

There follow, in s 2, three extensions to the applicability of the Convention which are peculiar to South African law: First a subject of salvage shall include 'any fixed or floating platform or any mobile offshore drilling unit whether or not it is engaged in the exploration, exploitation or production of sea-bed mineral resources'. This extends the Convention requirement that 'property' be not permanently and intentionally attached to the shoreline'.[33] Second, 'damage to the environment' for purposes of the novel Art 14 special compensation is extended so that, unlike the Convention, it shall 'not be restricted to coastal or inland waters or to areas adjacent thereto, but shall apply to any place where such damage may occur'. And third, the 'fair rate' referred to in Art 14 in relation to a salvor's efforts to prevent environmental damage which are not fully met by the successful salvage of the vessel in distress, is deemed, in South African law, to include the element of profit which the House of Lords in *The Nagasaki Spirit* ruled against.[34]

The Act preserves a salvage claimant's maritime lien.[35]

§7-2.2.3 Assessors

Section 3 of the Wreck and Salvage Act preserves the traditional statutory right of a court which is hearing a salvage matter to appoint one or more advisory assessors, who are required to be impartial persons who are conversant with maritime affairs.[36]

33 Salvage Convention Art 1(c).

34 *The Nagasaki Spirit: Semco Salvage & Marine Pte Ltd v Lancer Navigation Co Ltd* [1997] 1 Lloyd's Rep 323 (HL). The South African Act was finalised after the *Nagasaki Spirit* dispute had reached trial, and it was generally believed by those responsible for the promotion of the Act that for Art 14 to be an effective incentive for salvors to undertake high-risk salvage of oil tankers in distress, some measure of profit should be included in the special compensation. The Act anticipated a possible ruling against profit in the appeal to the House of Lords, which was then pending. See further §7–8

35 Wreck and Salvage Act, s 2(10).

36 The English Admiralty Court was usually called upon by the parties to a salvage matter to call in Trinity Masters as assessors. In *The Princess Alice* (1849) 166 ER 914, where the parties had failed to do so, Dr Lushington remarked:

> 'In this case (which appears to me to be peculiarly open to such an application), neither of the parties has made any request to this effect; and they have left the Court to its own exertions to elucidate questions which are of no ordinary difficulty. If, therefore, either of the parties should think that, in the decision I am called upon to pronounce, they are aggrieved from any misunderstanding of mine, either as to the locality or the points of nautical knowledge, they must bear the consequences of not having availed themselves of that mode of proceeding which it was in their own power to have adopted.'

The merits and assessment of the reward in modern salvage claims are seldom pursued in courts. Both salvors and the owners of salved vessels tend rather to opt for arbitration before an arbitrator perhaps better versed in salvage than the courts. Court applications are however often resorted to in relation to the ancillary relief sought in connection with salvage claims, such as inspection, discovery, and particularly security.

§7-2.2.4 Statutory duty to assist persons and ships in distress

Maritime law has long imposed a duty on vessels to assist others in distress. Lord Stowell in *The Waterloo*[37] confirmed

> 'It is the duty of all ships to give succour to others in distress; none but a freebooter would withhold it.'

Statute law distinguishes between the duty to assist applicable to domestic ships from that of a foreign flagged vessel. South African ships must assist both persons and property in distress. Foreign ships are required by statute only to render assistance to distressed persons.[38] The Act confirms the obligation of the master of a South African ship to assist all vessels in distress, under pain of making an official log entry explaining his failure to do so:

> 'If the master of a South African ship, on receiving at sea a signal of distress or information from any source that a ship is in distress, is unable, or in the special circumstances of the case considers it unreasonable or unnecessary, to go to the assistance of the person in distress, he or she shall forthwith cause a statement to be entered in the official logbook, of his or her reasons for not going to the assistance of that person.'[39]

Section 6 extends this obligation to the master of all ships, local or foreign, where persons are in distress at sea, and s 7 requires the masters of all ships involved in a collision at sea to render assistance each to the other. These obligations will be considered again in relation to the requirement that salvage be voluntarily rendered, not in pursuance of any pre-existing duty.[40] The Act ensures that this common law requirement of salvage is not transgressed by enacting that

> 'Compliance by the master of a ship with the provisions of this section shall not affect his or her right, or the right of any other person, to salvage.'[41]

§7-2.2.5 Formalities in relation to salvage

The Act appoints as 'salvage officers' 'suitably qualified persons who have prescribed duties and powers'. Perhaps the most historic power is that of s 13:

> 'No person shall, when a ship is wrecked, stranded or in distress, plunder, create disorder or obstruct the preservation of the ship or shipwrecked persons or the wreck, and the salvage officer or his or her authorised representative may cause any person contravening the provisions of this section to be detained.'

37 *The Waterloo* 2 Dod 437 quoted in *The Sappho* (1871) 17 ER 238 at 240.

38 There seems little logic to this distinction.

39 Wreck and Salvage Act, s 5(5).

40 §7-4.1.1.

41 Wreck and Salvage Act, s 5(6). In relation to the duty to assist after collision, see s 7(2).

The salvage officer is empowered to conduct an investigation when any ship is 'wrecked, stranded or in distress,[42] but, in exercising his or her powers, a salvage officer may not 'interfere with the lawful performance of a salvage service by a salvor.'[43]

The salvage officer is given the power to detain a ship which has been salvaged 'until payment is made for the salvage due, or until process for the arrest or detention of such ship or wreck by a competent court is served.' The salvage officer is required to release any ship thus detained upon provision of security 'to his or her satisfaction'.[44]

§7-2.2.6 No forfeiture of crew salvage rights

The Act retains the prohibition on a seaman signing away his or her right to salvage on all vessels other than those dedicated to salvage.[45] At common law, salvage accrues to the master, crew and owners of a salvaging vessel, without any prior agreement that this be the case. Salvage tug crews are usually required to sign 'salvage articles' which vary their common law right to share in a salvage award with their master and owners.

§7-2.2.7 The state as salvor or as the owner of salvaged property

The Act binds the state, and therefore makes the salvage of state owned vessels, and salvage by government vessels of private or other state vessels, subject to its provisions.[46] The Convention however preserves the right of a state to claim sovereign immunity:

> 'Without prejudice to article 5, this Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under generally recognised principles of international law unless that State decides otherwise.'[47]

South African law recognises the principles of sovereign immunity.[48]

42 *Ibid*, s 11.

43 *Ibid*, s 10(3).

44 *Ibid*, s 17. Although an admiralty arrest can be issued by the High Court very speedily, there could be circumstances in which a vessel is likely to abscond following a successful salvage operation where this short-circuit of the legal process could be invoked.

45 *Ibid*, s 19.

46 *Ibid*, s 24.

47 Salvage Convention Art 4(1).

48 *The Mariannina: Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others* 1976 (4) SA 464 (SCA); *The Vallabhbhai Patel: The Shipping Corporation Of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (SCA). *The Oscar Jupiter: KJ International And Others v MV Oscar Jupiter (Compania De Navigatie Maritime Romline SA and Others Intervening)* 1998 (2) SA 130 (D).

The provisions of Art 5 are also of consequence in assessing the powers of the South African authorities under the Marine Pollution (Control and Civil Liability) Act[49] and the Intervention Convention,[50] to take necessary steps to avert an environmental disaster, and in that event to dictate to both the owner and the salvor what should or should not be done with the salved vessel. In relation to salvage operations controlled by public authorities, Art 5 provides:

> '(1) This Convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.
>
> (2) Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.
>
> (3) The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.'

This should mean that South African statutory powers of intervention would be unaffected by the Salvage Convention.

§7-3 General principles of salvage law: equity and public policy

The right to claim salvage is a fundamental right of international maritime law, depending neither upon any contractual engagement between the salvor and the owner of the salved property, nor upon a cause of action in delict (tort). It is a right *sui generis*, though it may display similarities to established causes of action such as *negotiorum gestio* and unjustified enrichment. It does not require compartmentalisation.[51] It has stood upon its own foundations in maritime law from the earliest times:

49 Act 6 of 1981, dealt with in §11-2.4.

50 Enacted into South African law in the Marine Pollution (Intervention) Act, 64 of 1987. See §11-2.4

51 See for example *The Calypso* (1828) 2 Hagg 209, in which Sir Christopher Robinson gives a history of the derivation of salvage law, attributing its origins to *negotiorum gestio* as expounded in *Dig*. 3.5. This pedigree is questioned by Roscoe *Admiralty Practice* 5th Edition at 126. The relationship between salvage and *negotiorum gestio* is examined by Professor van Niekerk in *Salvage and Negotiorum Gestio: Exploratory Reflections on the Jurisprudential Foundation and Classification of the South African Law of Salvage* (1992) *Acta Juridica* 203. Professor van Niekerk concludes that there is a jurisprudential home for salvage in the Roman-Dutch principle of *negotiorum gestio*, referring, *inter alia*, to the writings of *Grotius Inleidinge* 3.27.6. For views on salvage as enrichment see Rose *Restitution and the Rescuer* (1989) Oxford Journal of Legal Studies 173, and cf Visser *Rethinking Unjustified Enrichment: A Perspective on the Competition between Contractual and Enrichment Remedies* (1992) *Acta Juridica* 203. Many attempts have been made to categorise salvage, *inter alia* as not only as *negotiorum gestio* and enrichment, but also as an implied contract (*The Lord Dufferin* (1849) 7 Not of Cas Supp xxxiii (Bombay SCJ)) and cf *The Toyo Maru* Appeal Court judgment per Lord Diplock [1972] AC 242 at 268.

> 'To rest the jurisdiction of the Admiralty Court upon an implied request by the owner of the property in danger to the salvors, or on an implied contract between the salvors and the owners with the relinquishment of the *res* is to confuse two different systems of law and to resort to a misleading analogy. The true view is … that the law of Admiralty imposed upon the owner of the property saved an obligation to pay the person who saves it, simply because in the view of that system of law it is just that he should …'[52]

There is no cause of action for salvage in a non-maritime context'.[53] Said Dr Lushington in *The Fusilier*,[54] 'Salvage is not governed by the 'ordinary rules which prevail in mercantile transactions on shore.'

Judge Story endorsed salvage in somewhat more expansive terms:

> '[Salvage] offers a premium by way of honorary reward, for prompt and ready assistance to human sufferings; for a bold and fearless intrepedity; and for that affecting chivalry, which forgets itself in an anxiety to save property, as well as life.'[55]

All maritime salvage is subject to the same general principles: the salvage of an ultra large crude carrier, laden with 300 000 tonnes of crude oil is governed by the same underlying laws as the salvage of one local fishing smack by another. The first principle is that salvage is, to a greater extent than most other law, governed by equity.[56] The equity of giving a reasonable reward for spontaneous services to save property and life gave rise to a cause of action in Roman Law and is recognised in the English courts. Inequitable rewards for salvage, even if agreed in advance, fall to be brought into line by the courts.[57]

There would appear no reason, however, why salvage should not take its rightful jurisprudential place as a right recognised by maritime law, *sui generis*.

52 *The Cargo ex The Port Victor* [1901] P 243 at 249.

53 *The Goring* [1988] 2 WLR 460 (HL), and the commentary on the case by Professor Jackson *Non-Tidal Salvage* [1988] LMCQ 449.

54 Dr Lushington in *The Fusilier* (1865) Br & Lush 341 at 347.

55 *The Henry Ewbank* (1883) 11 Fed Cas 1166 at 1170.

56 The term 'equity' in this context does not relate to the distinction between courts of common law and equity of England. The expression is used in the sense of fairness and justice. Similarly, the use of the term 'common law' describes the South African fall-back legal system which complements and supplements statute law, and does not allude to the English practice of common law, in contradistinction to the civilian law.

57 *The Medina* (1876) 1 PD. In the South African case of *The British Empire: Blackburn v Mitchell* (1897) 14 SC 338 a tug offered assistance to a vessel which had lost both anchors, threatening to leave the vessel to beach if his price of £2 000 were not paid. The court reduced the award to £1 000. See also *The Guglielmo O: Anderson & Murison v Druscovitch* (1888) 6 SC 134.

Second is the general motivation of public policy referred to by Dr Lushington in *The Fusilier*[58] thus:

> 'Salvage is governed by a due regard to benefit received, combined with a just regard for the general interests of ships and maritime commerce. All owners of ships and cargoes and all underwriters are interested in the great principle of adequate remuneration being paid for salvage services; and none are more interested than the underwriters of the cargo'.

In the United States, Story J declared that salvage should thus be treated as 'a mixed question of public policy and private right'.[59]

The Salvage Convention and public policy and equity

The Salvage Convention accords some recognition to public policy in its preamble, which records that the state parties to the convention are

> 'conscious of the major contribution which efficient and timely salvage operations can make to the safety of vessels and other property in danger and to the protection of the environment'.

The convention then gives practical effect to overarching principles of equity and public policy in Art 7 which allow a salvage contract or any terms thereof to be annulled or modified if:

'(a) the contract has been entered into under undue influence or the influence of danger and its terms are inequitable; or

(b) the payment under the contract is in an excessive degree too large or too small for the services actually rendered.'

§7-4 Essential elements of salvage:

Around these general principles, the following essential ingredients were requirements of all traditional salvage operations and claims. All except the requirement that property salved be 'maritime', remain, directly or indirectly, prerequisites for salvage under the Salvage Convention:

(a) Salvage services of a particular nature; rendered to

(b) Salved maritime property – perhaps coupled with saved life; giving rise to

(c) A salved fund from which an award is made; to

(d) A salvor whose conduct does not vitiate or reduce the award.

58 *The Fusilier* (1865) Br & Lush 341.

59 Quoted in *Kennedy, op cit* at 19. The same expression was used by Sir Samuel Evans in *The Leon Blum* [1915] P 90 at 102. In *The Albion* (1861) 167 ER 121, Dr Lushington endorsed Story J's comments.

Unless all four are present, there can, at common law, be no salvage. But the converse also applies: with all four of the above ingredients, there was, at common law, salvage which should attract an award. The assessment of the award then became only a question of degree. We shall be looking at each prerequisite in turn, bearing in mind the definition of salvage given by *Kennedy*:[60]

> 'a service which confers a benefit by saving or helping to save a recognised subject of salvage when in danger from which it cannot be extricated unaided, if and so far as the rendering of such service is voluntary in the sense of being attributable neither to a pre-existing obligation nor solely for the interests of the salvor.'

§7-4.1 Salvage services of particular nature

Salvage services may be maritime or non-maritime in nature. It is not necessary that the services themselves be of a marine nature, or rendered at sea: it is the nature of the property salvaged and its situation that gives the services their maritime nature. Thus salvors and their operations may be shore-based – and it is conceivable that a radio ham, perhaps situated far inland, may be able to render salvage assistance by relaying distress calls and messages to and from a vessel in danger. An example of this is recognition that the sending of a cable by a lighthouse keeper calling for tugs was found to give rise to a claim for salvage.[61]

To constitute salvage, the common law required salvage services to be voluntary, rendered in circumstances of danger to the salved property (though not necessarily to the salvor), and successful or at least beneficial in relation to the outcome. We shall consider each in turn, noting the extent of changes brought about by the Salvage Convention.

§7-4.1.1 Voluntariness

Traditional law on voluntariness

The salvage service must not be

- rendered by reason of an agreement pre-dating the danger;
- an official duty;
- rendered purely in self interest.

***Seriatim*:**

60 *Kennedy, op cit* at 11.

61 *The Marguerite Molinos* 1903 P 161.

Voluntary by no prior agreement

In *The Neptune,* the Admiralty Court referred to 'disinterested outsiders' being entitled to salvage:

> 'The equitable basis of salvage is not there merely to encourage those who have a duty to preserve or indeed save maritime property to do their job. It is to encourage disinterested outsiders without any particular relation to a ship in distress'.[62]

But an agreement to salvage entered into after the danger arose, is no bar to a claim for salvage.[63] Such an agreement may be in any legal form, written or verbal.[64]

Perhaps the most common incidence of a pre-existing duty is found in 'salvage' services rendered during the performance of a towage contract.[65] It is necessary for the tug to show that some services beyond the contemplation of the towage agreement and in the nature of salvage were rendered. The onus is firmly on the tug and it is not generally easy for a tug operator to convert his towing services to salvage.[66]

62 *The Neptune* (1824) 1 Hagg 227 at 236, quoted in *Kennedy, op cit* at §431.

63 *Clan Steam Trawling Co Ltd v Aberdeen Steam Trawling and Fishing Co Ltd* (1908) Session Cases 651. See also *The Harry Escombe: Maytom v Master of the Harry Escombe* 1920 AD 187 in which a harbour tug performed salvage under a no cure – no pay contract, and the claim of the master and crew for their share of the award was disallowed by the court on appeal. In *The Indian Prince: SAR&H v Wilcock NO* 1935 CPD 489 at 500, the court allowed salvage even where there was some remuneration agreed even if there be no success. The correctness of this decision is doubtful. [*Caveat* s 6 of the Admiralty Jurisdiction Regulation Act.]

64 The difficulty with a verbal contract is in proving disputed terms – including upon whose behalf the contract was entered into. In *The Berwick Castle: Union Castle Mail Steamship Co v Irvin & Johnson Ltd* 1921 CPD 712, there was doubt about the master having bound cargo to the salvage. The court indicated that such an agreement should be clearly pleaded. See also *The Yute: Union Government v The Master of the Spanish Ship Yute* 1917 CPD 494 at 502. For the master's authority to bind all interests to salvage see *SAR&H v Osaka Shoshen Kaisha* 1938 (2) PH F76 (C). [*Caveat* s 6 of the Admiralty Jurisdiction Regulation Act.]. In *The Philippine Commander: CE Heath & Co (Marine) Ltd v Crimson Navigation Corp SA* 1988 (1) 457 (D) the court accepted (at 460) that the demise charterer's master had authority to act on behalf of the owners in connection with the salvage although he was not, in fact, their servant.

65 Staniland *Towage or Salvage: The Manchester* [1988] LMCQ 16. The South African court in *The Manchester* allowed conversion from towage to salvage in the light of the wording of the port authority's contract and the then wording of the Merchant Shipping Act, 1951 entitling a person who renders assistance to a ship 'in distress' to a salvage award. The Court, simplistically, found that the *Manchester* was 'in distress' and that her saviors were thus 'salvors', notwithstanding that they had towage obligations which probably encompassed their actions in saving the vessel. See also *The Sellasia: Master, Officers etc of ST JW Sauer v Owners of SS Sellasia* 1926 CPD 437 at 440 where the court recognised the possiblity of conversion of towage to salvage where duties were required of the tow outside of its ordinary employment.

66 *The Maréchal Suchet* [1911] PD 1. The 1910 Convention, Art 4 stated:

> 'A tug has no right to remuneration for assistance to or salvage of the vessel she is towing or of the vessel's cargo, except where she has rendered exceptional services which cannot be considered as rendered in fulfilment of the contract of towage.'

A pilot is also usually regarded as being under a contractual obligation to give all necessary assistance to the vessel he is piloting. But he too may convert his routine pilotage into salvage if

> ' ... on certain emergencies occurring which require extraordinary service, the pilot is bound to stay by the ship (as with the tug having the vessel in tow) but becomes entitled to salvage remuneration and not mere pilotage fee.[67]

The possible conflict of interests which an avaricious pilot may feel in holding off *bona fide* salvors in the vain hope of himself sorting out the problem and claiming a reward was recognised in *The Sandefjord*[68] where the court expressed the view that pilots should be discouraged from claiming salvage.

Ships' agents and the master and crew of vessels are not generally entitled to claim salvage by reason of their contractual relationship with the vessel or her owners though this is often considered tenuous.[69] In the South African case of *The Harry Escombe*,[70] ships' agents are referred to as possible exceptions, and may, in appropriate circumstances, be entitled to salvage.

Lifeboat crews are governed in the United Kingdom by Royal Charter which entitles them to seek salvage rewards for property only if no other vessel is standing by to assist. The court discourages lifeboatmen to save property.[71] A similar discouragement may be expected from the South African courts.

Voluntary by no pre-existing duty

The South African Wreck and Salvage Act and most similar statutes in the world impose obligations upon persons to give help at sea to those in peril.[72]

In *The Tower Bridge*,[73] a defence that assistance was given in compliance with the English Merchant Shipping Act (Safety and Loadlines) Act, 1932 did not defeat a claim for salvage. This

The 1989 Salvage Convention is silent upon the point, and the conversion of towage (or indeed any other service) to salvage would have to be determined according to the common law, having regard also to the Convention.

67 Dr Lushington in *The Saratoga* Lush Adm 318 affirmed in *The Ailo* (1880) 7 QBD 129 (CA).

68 *The Sandefjord* (1953) 2 Lloyd's LR 557. See also *The Kenora* [1921] PD 90.

69 *The San Demetrio* (1941) 69 Lloyd's LR 5 and *The Albionic* [1942] PD 81.

70 *The Harry Escombe* 1920 AD 187 at 194.

71 *The Viscount* [1966] 1 Lloyd's Rep 328.

72 *Supra* at §7-2.2.4 The English Maritime Conventions Act of 1911 imposed a similar duty. See *The Gusty v The Daniel M* [1940] P 159 and *The Tower Bridge* [1936] P 30.

73 *The Tower Bridge* [1936] P 30.

case is also interesting because the salvage services were stand-by services and 'moral support', with nothing being physically done to the salved vessel by the salvors.[74]

It appears that, following English law, there is also no bar to the South African Navy claiming salvage of civil vessels provided services outside of their normal duties are rendered.[75] Navy vessels may also be salvaged.

Voluntary by being not purely for self interest or self-preservation

In traditional law, salvage must thus be 'voluntary', or, as *Kennedy* describes it, 'gratuitous'.[76] We shall discuss later the extent to which a salvor is entitled by right to commence salvage uninvited and to continue salvage unwanted.[77]

A passenger who helps with salvage of the vessel he is travelling on is not normally entitled to salvage as he is acting in self-preservation.[78] A good example of self-preservation is *The Lomonosoff*-[79] in which British and Belgian soldiers escaped the Bolsheviks in Murmansk by getting the *Lomonosoff* under way, co-incidentally saving her as well. As their motives were not solely self-preservation, they were allowed salvage. It is possible that the bar on master and crew claiming salvage of their own vessel could derive also from this rule.

The Salvage Convention and voluntariness

The Salvage Convention deals only minimally with voluntariness. Article 17 reads:

> 'No payment is due under the provisions of this Convention unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose.'

74 See also *The Melanie v The San Onofre* (1925) AC 246 (HL). It should be noted also that these statutory duties, in both England and South Africa, apply to home flag vessels, wherever operating, and to foreign vessels in home waters. The statutory obligations of the flag country could thus be significant even where a salvage claim was being heard in the South Africa court in terms of English law, but subject to the overriding application of the Wreck and Salvage Act.

75 *The Carrie* [1917] P 224. See also *The Louisa* (1813) 165 ER 1324, where salvage were awarded to a Royal Naval vessel. Per Scott J:

> 'The captain of a man-of-war is not bound to put himself or his men in danger to preserve a merchant ship from sinking; and I do not know that he is bound to take her in tow. He did so, in this instance, for as long a time as any assistance of that kind was required; and although the service which has been performed is not of the highest degree of merit, it is not to be too lightly estimated.'

76 *Kennedy, op cit* at §456.

77 On the conduct of salvors see §7-4.4.

78 *Kennedy, op cit* at 433.

79 *The Lomonosoff* [1921] P 97.

Whilst broad enough to delimit the conversion of contractual obligations, such as towage and pilotage, to salvage, the article does not deal with the actions of potential salvors who are acting in pursuance of a statutory or even common law[80] duty, such as those who save life or property in pursuance of their duty thus to act. In Art 10, the Salvage Convention reinforces the master's duty to render assistance:

> 'Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.'

But there is no saving of the master's right to claim salvage if he acts in pursuance of this duty, and not gratuitously. It is thus reasonable to conclude that the Salvage Convention would allow the non-voluntary salvor who performs a salvage operation and complies with the other requirements of the Convention, to claim salvage notwithstanding the existence of a pre-existing duty.[81]

§7-4.1.2 Danger

Traditional salvage law and danger

Without the element of danger, there can be no salvage service. Although it is the maritime property which must be in danger (even if there be no danger to the salvors)[82] danger may be regarded as an essential element of a salvage service.[83]

The danger must be real[84] and sensible. But it need not be immediate. It must not, said the court in *The Helmsman*,[85] be purely a question of fancy. The onus of establishing the existence of danger is on the salvors – an onus greatly eased if the master has sent out distress signals.[86] Sending

80 Upon the use of the term 'common law' see the comments in §7-3.

81 It should be noted that the Wreck and Salvage Act in s 6(2) preserves the master's right to claim salvage for services rendered in pursuance of the statutory duty imposed by s 6 by providing that 'compliance by the master of a ship with the provisions of ss (1) shall not affect his or her right, or the right of any other person, to salvage.'

82 *The Pericles* (1863) Br & Lush 80. Danger to the salvors may however be taken into account in assessing salvage. This was done, as was their having employed a specialist tug, in *The Lief: Associated Boating v Baardsen* (1895) 12 SC 330. See also *The Itzehoe: Messina Bros, Coles & Searle* [*Caveat* s 6 of the Admiralty Jurisdiction Regulation Act.].

83 *Kennedy, op cit* in Chap 4 at 129 *et seq* treats the two concepts together.

84 The danger need not be absolute nor imminent, provided that it is real. *The Blairhoyle: Randall v Gray* (1895) 12 SC 387. *The Papanui: Table Bay Harbour Board v New Zealand Steamship Co* (1901) 18 SC 34. The salvors need not necessarily be in danger *The Petunia: East London Landing and Shipping Co v Birmingham* (1882) 2 EDC 394 at 399. Where however a vessel was in imminent danger of running aground and was provided with an anchor by a salvor, a 12% award was made. *The Marie Jose: Mossel Bay Boating Co v Brink* (1901) 18 SC 271 at 274. [*Caveat* s 6 of the Admiralty Jurisdiction Regulation Act.]

85 *The Helmsman* [1950] 84 Lloyd's Rep 207.

86 *The Cynthera* [1965] 2 Lloyd's Rep. 294.

out false distress signals may give rise to a claim in the nature of salvage for search and rescue expenses thereby incurred.[87]

It is again Dr Lushington in *The Phantom*[88] to whom we look for an early analysis of 'danger':

> '... I am of the opinion that it is not necessary there should be absolute danger in order to constitute a salvage service; it is sufficient if there is a state of difficulty, and reasonable apprehension. ... I think the removing of a vessel from apprehended danger, and real danger, does partake of the character of salvage service.'

In *The Charlotte*,[89] Dr Lushington, in dealing with the salvage of the *Charlotte* from grave circumstances in the aptly named Roaring Water Bay, said again:

> 'All services rendered at sea to a vessel in danger or distress are salvage services. … It is not necessary that the distress should be actual or immediate or that the danger be imminent or absolute; it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the service were not rendered.'

And if the master be frightened and incompetent, this in itself can be sufficient danger,[90] though his apprehension of danger must not be merely fanciful, as was stated in *The Helmsman*.[91]

The Salvage Convention and danger

The pre-requisite of the salved property being in danger is confirmed by Art 1 of The Salvage Convention:

> 'Salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.'

In the absence of any definition of 'danger', the courts would look to the common law for guidance. 'Danger' was a term of art developed by the law prior to the Convention. Its meaning should remain unaltered by the Salvage Convention.

87 *The Elswick Park* [1904] P 76. Where false signals are sent out, the master, in English law, is liable both for a fine and for the payment of the expenses of anyone coming to his aid. The 1949 Merchant Shipping Act (Safety Conventions Act) allowed this claim to be collected 'in the same manner as salvage'. There would appear to be no similar provision is South African law. It is possible that, by the application of s 6 of the Admiralty Jurisdiction Regulation Act, the 1949 English Merchant Shipping Act may be found to be applicable in South Africa.

88 *The Phantom* (1866) LR 1 A & E 58 at 60.

89 *The Charlotte* (1848) 3 WRob 68.

90 *The Pendragon Castle* (1924) 5 F 2nd 56.

91 *The Muanza: SAR&H v SS Muanza* (1923) EDL 216. [*Caveat* s 6 of the Admiralty Jurisdiction Act.]

§7-4.1.3 Success

Traditional salvage law and success

In *The India*[92] Dr Lushington laid the ground rules requiring success thus:

> 'Unless the salvors by their services conferred actual benefit on the salved property they are not entitled to salvage remuneration'.

Thus where a vessel is left by her salvors in greater danger than when the salvage efforts began, there can be no 'salvage service'.[93] In *The Melanie v The San Onofre*,[94] Lord Phillimore referred to 'meritorious contributions towards success' which, though in themselves are only partially or initially successful, are nevertheless contributory to ultimate success, and thus give rise to salvage. The converse, stated Lord Phillimore, was also clear: no matter how meritorious, if there is no contribution towards the ultimate success, there is no salvage.

What if the salvor is prevented from completing its salvage by factors not of its own making? It is generally accepted that in such a case, its contribution should be rewarded, but it may be that, as a result of it being prevented from being able to complete its salvage, there is no ultimate success. The answer appears to be that the salvor will then obtain a reward 'in the nature of salvage',[95] possibly even as damages for loss of opportunity to complete the services (although Brandon J rejected this basis for compensation in *The Unique Mariner No 2*,[96] preferring to regard the compensation as based on considerations of public policy).

The master of the salved vessel remains totally in command of his vessel's fate: if he refuses salvage, a salvor may not force its attentions on the vessel. If a salvor imposes its services upon an unwilling vessel, it will earn no salvage for such efforts.[97] And even where one salvor is already engaged and at work, the master of the salved vessel retains the right to call in further salvors whose intervention the first salvor may not oppose.[98] The first salvor's only recourse is to approach the court for the assessment of its reward for its contribution towards the ultimate success. The first salvor may not resist the handing over of salvage to the second salvor,[99] but it could presumably take steps to protect its maritime lien over the salved property for services

92 *The India* (1842) 1 Wm Rob 406.
93 *The Cheerful* (1885) 11 PD3.
94 *The Melanie v The San Onofre* [1925] AC 246 (HL).
95 *Kennedy, op cit* at 646.
96 *The Unique Mariner No 2* [1979] 1 Lloyd's Rep 37.
97 *The Fleece* (1850) Wm Rob 278.
98 *Cossman v West* (1887) 13 App Cas 160.
99 *The Friesland* [1904] P 345.

already rendered.[100] As this lien is not dependent upon possession, it is unlikely that a court would allow the first salvor to retain possession to the exclusion of a *bona fide* second salvor appointed by the master or owners of the salved vessel. But the court, rather like being upper custodian of minors, regards itself as the upper custodian of vessels in distress, and may itself assess the necessity and effectiveness of second and subsequent salvors, generally favouring the efforts of the first salvors in the assessment of an award.[101] The court should not question the master's right to dismiss the first salvors and call in others. That right must be absolute. Only where a ship has been abandoned in the true sense of the word, so that she is a *res derelicta*, may the salvor refuse to submit to the authority of the master (and any other person seeking to reassert authority).[102]

A salvor contractually engaged in salvage 'under means sufficient for the purpose' may not be displaced from that salvage by another salvor.[103] *The Unique Mariner No 2* is the leading case on the subject of subsequent salvors and in his judgment Brandon J reviews the previous leading cases upon which the common law is founded.[104] It is interesting to note that in all these cases some property at least was saved. But in *The Valsesia*,[105] although there was no ultimate success, the court nevertheless held that a reward should be made as 'damages'.

The Salvage Convention and Success

Article 12 of the Salvage Convention provides an unequivocal confirmation of the requirement of success:

100 *The Maria* (1809) 165 ER 1073.

101 *The American Farmer* [1947] 80 Lloyd's Rep 672.

102 *Cossman v West, supra.*

103 *The Maria* (1809) 165 ER 1073, in which two fishing smacks were salvaging a vessel and were dispossessed by a gun-brig of the Royal Navy. On the question of the rights of the first salvors, Scott J said:

> 'Two hours after this, up comes the '*Mariner*' gun-brig, dispossesses the fishing smacks, and now claims to be considered not only as salvor, but as principal salvor, by the Court. The question of merit or of demerit on her part must depend upon a preliminary question, which is, whether her assistance was wanted or not; because the character of the act must be determined by the necessity of this interference. If there was no such necessity, it will be a case rather of demerit than of merit; a salvor who is in possession has a lien, a qualified property in the thing saved -, and it may be extremely injurious, not only to his interests, but to those of the owners themselves, that he should be put out of possession, and his reward disputed or interfered with by others, until the matter can be adjusted in a Court of Justice.'

104 Including *The Maude* (1876) 36 LT 26, *The Maasdam* (1893) 69 LT 659, *The Loch Tulla* (1950) 84 LIL Rep 62, and *The Hassel* [1959] 2 Lloyd's Rep 82. Brandon J's conclusions are reviewed in *Kennedy, op cit* at 648.

105 *The Valsesia* [1927] P 115.

> 'Salvage operations which have had a useful result give right to a reward. Except as otherwise provided, no payment is due under this Convention if the salvage operations have had no useful result.'

The 'useful result' of the Convention wording, should be no different in effect from the 'meritorious contribution towards success' of Lord Phillimore.[106]

The Salvage Convention deals with the question of subsequent salvors in Art 7 by imposing corresponding duties on the owner of the salved vessel and on the salvor. Thus the salvor is required by Art 1(1):

> '(c) whenever circumstances reasonably require, to seek assistance from other salvors; and
>
> (d) to accept the intervention of other salvors when reasonably requested to do so by the owner or master of the vessel or other property in danger; provided however that the amount of his reward shall not be prejudiced should it be found that such a request was unreasonable.'

The concomitant duty of the owner is expressed in Art 7(2):

> 'The owner and master of the vessel or the owner of other property in danger shall owe a duty to the salvor:
>
> (a) to co-operate fully with him during the course of the salvage operations;'

It is unlikely, therefore, that the Convention will upset the established law of *The Unique Mariner No 2* to the effect that an owner has the right to interpose a subsequent salvor on a prior salvor where no contract binds the two (provided now however, in terms of the Convention, that the interposing is a 'reasonable request') but the owner is obliged to allow a reasonable opportunity (as the Convention's 'full co-operation') for the prior contracted salvor to complete the salvage before imposing a subsequent salvor upon it to take over the operation.

In relation to multiple salvors, the Salvage Convention imposes a duty upon state parties to the Convention by requiring that:

> 'A state party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.'

106 *The Melanie v The San Onofre* [1925] AC 246 (HL).

And lest there be any doubt that *The Fleece*[107] doctrine against foisting salvage upon an unwilling recipient remains central to voluntary salvage under the Salvage Convention, Art 19 provides:

> 'Services rendered notwithstanding the express and reasonable prohibition of the owner or master of the vessel … shall not give rise to payment under this convention.'

§7-4.2 Salved maritime property

§7-4.2.1 Traditional salvage law and maritime property

Traditionally, salvage services must be rendered to maritime property, although the concept is also applicable to the salvage of aircraft.[108] The commonly accepted principle was that salvage applied only to a ship[109] to her cargo, her apparel and equipment and to her freight. In *The Gasfloat Whitton No 2*,[110] the House of Lords endorsed the *numerus clausus* of maritime *res* defined by Lord Esher MR: the result was that the ship (if used as a ship), her cargo, flotsam, lagan and jetsam, the wreck of each, and freight (with the addition of life salvage by reason of statute) were the only items to which salvage services could be rendered prior to the Salvage Convention.

The cargo of a vessel may be salvaged even where there is no salvage of the vessel herself[111] and the identity of the cargo owner does not need to be known though the cargo should then be described as 'the cargo lately laden' on board the vessel concerned. Where goods such as buoys are under tow, and these are not 'ships', it is possible that they could be included as 'cargo'.[112] Charterer's bunkers were traditionally also regarded as maritime property, probably under the guise of cargo. In *The Silia*,[113] Sheen J regarded the definition of 'ship' as wide enough to include the hull, machinery and everything on board which is the property of the owners. The approach to salvage of freight is casuistic, and depends whether freight would have been lost had the salvage services not been rendered.[114]

107 *The Fleece* (1850) Wm Rob 278.

108 During the Falklands war, a Royal Air Force VTOL aircraft was forced to land, unexpectedly, on a container stowed on the foredeck of a ship *en route* to the South Atlantic. The owners of the ship claimed salvage from the British government. The claim was, according to press accounts at the time, settled out of court.

109 Or more accurately, a ship used or capable of being used in navigation, borrowing from the definition of the Merchant Shipping Act, 1951, both in the United Kingdom and South Africa.

110 *R v Two Casks of Tallow* (1837) 3 Hag Adm 294; *Five Steel Barges* (1890) 15 PD 142; *A Raft of Timber* (1844) 2 W. Rob 251; *The Gasfloat Whitton No 2* [1895] P 308.

111 *Kennedy, op cit* at 170.

112 *The Gasfloat Whitton No 2* [1895] P 308.

113 *The Silia* [1981] 2 Lloyd's Rep. 534.

114 *The Pantanassa* [1970] 1 Lloyd's Rep 153.

The traditional law limiting salvage to maritime property, and then construing the term narrowly, resulted in possible anomalies arising, particularly in regard to the carriage on board of many high value items not the property of the owners and not cargo – including charterer's bunkers, and high value navigational equipment leased in by the owners. It also raised questions relating to 'non-tidal salvage', of property situated not at or on the sea. Thus for example, the House of Lords in England delivered an opinion that in English law, no salvage claim lay in respect of a vessel in non-tidal waters, including lakes and rivers above the reach of the tide.[115]

§7-4.2.2 The Salvage Convention and maritime property

Not unexpectedly therefore, Article 1 of the Salvage Convention expands considerably the traditional definition of property which is susceptible to salvage:

> '(a) Salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever....
>
> (c) Property means any property not permanently and internationally attached to the shoreline and includes freight at risk.'

The only limitation on property imposed by the Convention is to exclude from its ambit property which is 'permanently and intentionally attached to the shoreline'. This would include port installations, and arguably even Single Buoy Moorings which have permanent pipelines running to the shore.

Article 3 deals specifically with oil rigs and drilling units:

> 'This Convention shall not apply to fixed or floating platforms or to mobile offshore drilling units when such platforms or units are on location engaged in the exploration, exploitation or production of sea-bed mineral resources.'

But this exclusion is negated by s 2(6) of the Wreck and Salvage Act:

> 'Notwithstanding anything to the contrary in article 3 or any other article of the Convention, a subject of salvage shall include any fixed or floating platform or any mobile offshore drilling unit whether or not it is engaged in the exploration, exploitation or production of sea-bed mineral resources.'

The effect of s 2(6) is to make the Salvage Convention applicable to oil rigs of all types so that, under South African law, assistance rendered to an oil rig may be dealt with as a salvage claim under the Act and the Convention.

115 *The Goring* [1988] 2 WLR 460 (HL) and the commentary on the case by Professor Jackson in [1988] LMCLQ 448.

§7-4.3 Salved fund

§7-4.3.1 Traditional salvage law and the reward

One of the key principles of salvage is that the salvor is entitled to an equitable reward for saving property even where there is no prior or subsequent agreement between the parties either that there should be a reward, or, where an reward is contemplated, there is a lack of agreement as to quantum. The assessment of the award is done retrospectively by the application of salvage principles. In practice most awards are settled by the parties, or referred to the decision of an arbitrator. The principles are the same however. The assessment of the award, as with the concept of salvage itself, rests on public policy. All salvors should be adequately rewarded to encourage salvage of life and property, and professional salvors, who maintain capital intensive assets purely or at least primarily for the purpose of salvage, should especially be encouraged by a particular liberality. In the words of Dr Lushington in *The Albion:*

> 'It is of the utmost importance to the safety of shipping, that the owners of steam-tugs and other salvors should know that this Court is inclined to reward liberally unusual efforts to assist vessels in distress, wherever those efforts are successful.[116]

That liberality may be tempered where the tugowner uses his vessels also for lucrative towage – though today few salvors would survive from the salvage market alone.

The first rule is that the upper limit of the award is the salved value of the property salvaged. Thus it is that the first and often the most difficult negotiations toward an award concern the salved value of the various interests salvaged – ship, cargo and freight.[117] Each should contribute according to its own value.

The operative value is the market value of the property[118] as a going concern.[119] The insured value is only a factor, but is not conclusive in any way. And as it is the salved fund which stands behind the award, damage occurring during the accident giving rise to the salvage or during the salvage itself must be deducted from the otherwise sound value. It is an 'as is-where is' enquiry conducted when the salved property is delivered to safety. Conversely, events after completion of the salvage

116 *The Albion* (1861) 167 ER 121 at 123.

117 In *The Matthew Sheeman States Marine Corporation v SAR&H* 1949 (1) SA 693 (C) the court dealt with and dismissed a salvage claim brought against charterers. For a claim to arise against charterers, a contractual *nexus* is required between them and the salvors. [*Caveat* s 6 of the Admiralty Jurisdiction Regulation Act.]

118 *The San Onofre* [1917] P 96.

119 *The Edison* [1932] P 52.

are of no consequence, especially changes in the market or deterioration of the property. This is particularly important when perishable cargo is salvaged, and can spoil if there is any delay.[120]

There are times also when cargo has gained no real benefit from the salvage – such as where cargo was wet and worthless before salvage and remained so thereafter.[121] And there are also times where the cargo benefits considerably more than the ship. Thus in *The Velox*,[122] where the ship had run short of coal for her boilers but was not in any significant danger, but her cargo of fresh herrings would have deteriorated but for the replenishment of fuel, the greater award was made against the cargo interests. It can also be that the ship derives no benefit at all, though cargo or freight are preserved. In modern times, the cargo may often be worth far more than the ship, and the award then reflects this disparity of values.

Once the salved value of all salved property is agreed or adjudged, the arbitrator or the court is required to assess the amount of the award and the following factors have been found significant in traditional salvage law:

- The danger to the salved property and to human life.[123]
- The danger to the salving property, whilst not an essential prerequisite of salvage, is a factor affecting the award, as is its value.[124]
- The risks to third parties, especially environmental risks.[125]
- The nature of the salvage operation and its duration.[126]
- Responsibilities incurred by the salvors in performing the salvage – for example potential liabilities of salvors.

120 *The James Armstrong* (1875) LR 4 A & E and *The Velox* [1906] P 263.

121 *The Tabert* [1921] P 372.

122 *The Velox* [1906] P 263.

123 *The Bluebird* [1971] 1 Lloyd's Rep 229 where the court ruled that the special circumstances of the salvage indicated an award in excess of the 'usual' upper limit of 50% of salved value; and *The Elkhound* (1931) 39 Ll Rep 15; see also *The Geertjie K* [1971] Lloyd's Rep. 285.

124 *The Glengyle* [1898] AC 519; *The Evian* [1966] 2 Lloyd's Rep 41.

125 These risks and the extent to which salvors should be compensated for their reduction, will be considered in §7-6. Suffice to say that it has long been established that they are a factor which enhances a salvor's award. *Kennedy* regards these third party interests as 'collateral' to the dangers to the salved vessel herself rather than founding a separate salvage claim in their own right – referred to as 'liability salvage'. *Brice* disagrees. The enhancement of a salvage award because third party liabilities are saved should not be confused with the 'Safety Net' provisions of the LOF 1980 and the Art 14 Special Compensation of the Salvage Convention, which relate only to the situation where there is no (or insufficient) salved fund, but the environment has been saved from disaster. See §7-6.

126 *The Bluebird, supra.*

- The costs of the salvage to the salvor – both direct and indirect, and including fuel, insurance, deviation, loss of other opportunities, and damage to ship or gear.
- The salvor's classification as a professional or amateur salvor; its skill[127] and its conduct.

All of the above make up what Dr Lushington referred to as 'the many and diverse ingredients of a salvage service'.[128] And this list is by no means exhaustive.

§7-4.3.2 The Salvage Convention and the award

The Salvage Convention confirms the salved fund as the upper limit of the salvage award:[129]

> 'The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salved values of the vessel and other property',

and confirms that the award shall be paid by the vessel and other property interests in proportion to their respective salved values.[130]

Article 13 sets out a list of criteria for fixing the award, most, if not all of which are a restatement of the traditional law:

'(a) the salved value of the vessel and other property;
(b) the skill and efforts of the salvors in preventing or minimising damage to the environment;
(c) the measure of success obtained by the salvor;
(d) the nature and degree of the danger;
(e) the skill and efforts of the salvors in salving the vessel, other property and life;
(f) the time used and expenses and losses incurred by the salvors;
(g) the risk of liability and other risks run by the salvors or their equipment;
(h) the promptness of the services rendered;
(i) the availability and use of vessels or other equipment intended for salvage operations; and
(j) the state of readiness and efficiency of the salvor's equipment and the value thereof.'

127 *The Rhys* [1965] 1 Lloyd's Rep 29.

128 *The Charlotte* (1848) 3 W Rob 68 at 71.

129 Article 13(3), though the special compensation of Art 14 may be paid in excess of or even in the absence of a salved fund.

130 Article 13(2).

Although at first blush Art 13 would seem to point to this list being a *numerus clausus* of what the court or arbitrator should consider in fixing the award, the door is kept open to apply other criteria by the wording of Art 13(1):

> 'The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below.'

Provided the court or arbitrator has 'taken into account' the listed criteria, it may nevertheless apply other criteria (and draw guidance from the traditional law of salvage in so doing) 'with a view to encouraging salvage operations'. The Art 13 award needs surely to be painted 'with a fairly broad brush'.[131] It is inconceivable that the draftsmen of the Convention (and similarly the draftsmen of the Wreck and Salvage Act) could have intended in so subtle a manner to have fettered the common law liberality of the courts as expressed by Brett MR in *The City of Chester*:[132]

> 'There is no jurisdiction known [being the jurisdiction of the Admiralty Court in salvage matters] which is so much at large as the jurisdiction given to award salvage. There is no jurisdiction known in which so many circumstances, including many beyond the circumstances of the particular case, are to be considered for the purpose of deciding the amount of salvage award.'

To have deprived the courts of so 'large a jurisdiction' and thereby change the common law so profoundly would have required express terms.[133] Article 13 should then have read not only that the court or arbitrator 'shall apply' the listed criteria, but also, and clearly so, that the court or arbitrator should *only* apply the criteria listed.

The view expressed above that Art 13 is not an exclusive list of criteria, is not universally accepted. Indeed it is proffered with some diffidence in the light of contrary views taken in the United States in relation to Art 8 of the Brussels Convention (which also sought to list criteria) in *Westar Marine Services v Heerema Marine Contractors*,[134] and more especially because the *Westar* view is supported by *Brice* who suggests that:

131 This was the expression of Lord Mustill QC in delivering the opinion of the House of Lords in *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323 (HL). Lord Mustill was contrasting the assessment of an Art 13 reward from one in terms of Art 14, but he did not pronounce further on the method of assessment of Art 13 salvage.

132 *The City of Chester* (1884) 9 PD 182 at 187.

133 That the common law considered Dr Lushington's 'many and diverse ingredients' of a salvage award in South Africa also, is evidenced by *The Muanza: SAR&H v SS Muanza* 1923 EDL 216.

134 See *Westar Marine Services v Heerema Marine Contractors* 621 F Supp 1135 discussed in *Brice, op cit* §2-113 in which the United States District court stated its disapproval for interpolating words into conventions thus:

> 'If and when the London Salvage Convention 1989 has the force of law, then it would appear to be contrary to the principle of uniformity of salvage law to introduce into the assessment of salvage rewards criteria not contained in Art 13.'[135]

But to restrict the many influences which have traditionally been taken into account in assessing salvage is possibly even to 'deal with salvors in a niggardly way' which would 'do shipping a great harm'.[136] Neither does it do justice to the preamble to the Salvage Convention which recorded that the state parties were 'convinced of the need to ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger.'

Article 13, like the geographic limitation and the confusion over the determination of a 'fair rate' in connection with the special compensation provisions, is perhaps another area where the Salvage Convention could be improved in the future.

§7-4.4 Salvor's misconduct[137]

§7-4.4.1 Traditional salvage law and salvor's misconduct

The conduct of the salvor warrants special comment. We have seen that where a salvor foists its services on an unwilling victim, it may lose its award altogether.[138] Even where properly engaged however, the salvor can jeopardise all or part of its award by anything from wilful misconduct to negligence.

A salvor owes a duty of care to the owner of the property it is salvaging. 'Once there is shown to subsist a relationship of salvage between salvor and recipient there is contemporaneously created an obligation of care and skill on the part of the salvor.'[139] The misconduct of salvors may be used to defeat a salvage claim, or at least to diminish its quantum. In this respect the salvor's negligence or other misconduct is a 'shield' against the salvage claim. A salvor's misconduct may however

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> 'It is not for this court to arrogate to itself the position of an international lawmaking body and read additional factors for consideration into a treaty. Thus this court declines to consider the prevention of liability to third parties, public interest, or "benefits to the shipowner" as distinct factors in arriving at a salvage award under the treaty.' [Quoted by *Brice, op cit* §2-115].

135 *Brice, op cit* at §2-116.

136 As was cautioned against in *The Kratos: SAR&H v Master of the SS Kratos* 1921 Juta's Daily Reporter 645.

137 See generally, Rudolph *Salvor's Negligence* [1976] JML&C; and Thomas *The Negligence of Salvors* [1977] LMCQ 167–173.

138 §4-4.1.3 dealing with Art 19 of the Salvage Convention.

139 About this duty, there can at common law be no equivocation. See Rhidian Thomas *Salvorial Negligence and its Consequences* [1977] LMCLQ 167-173. See also Rudolph *Negligent Salvage: Reduction of Award, Forfeiture of Award or Damages?* JMLC Vol 7 No 2 419-431.

also found a separate claim by the shipowner against that salvor. The leading case on the negligence of salvors is *The Toyo Maru*[140] where a diver employed by the salvors, but without their instructions, fired a Cox bolt into an area of the *Toyo Maru* which had not been gas-freed. The resultant explosion caused damage which exceeded the salved value of the ship, when correctly taking the damage into account. In the Court of Appeal, Lord Denning found that the negligence could be used only as a shield against the salvage award, but not as a sword with which to sue the salvors. Lord Denning's opinion was overruled by the House of Lords, which allowed the owners a claim against the salvors based on their vicarious negligence.

A not uncommon occurrence during salvage operations, and perhaps a carry-over from the psyche of looting and wrecking, is theft from the salved vessel by a salvage crew. In *The Kenora*[141] the master and crew lost their rights to salvage altogether having stolen personal effects and stores. But the owners in that case were not privy to the theft, and the court upheld the Vice Admiralty Court at Cape Town's decision in *The Scindia,*[142] allowing the owners to claim salvage in their own right.

Misconduct of the salvors less than negligence, particularly duress, violence or overbearing conduct during the salvage and exhorbitant demands made of terrified masters, would all expose salvors to a lessening of their awards.[143]

May a salvor be accountable to a person suffering loss by reason of the salvor's failure to act at all or sufficiently? Is any person obliged (other than in terms of the statutory duty imposed by the Wreck and Salvage Act upon a South African ship to render assistance to any ship in distress) to render salvage services to another? In *The Antoinette*[144] a fishing boat owner was held liable to the dependants of a drowned crew member in consequence of the vessel having been sent to sea with an unseaworthy engine. When the owner failed to respond to a distress call from the vessel, and she sank, the court held the owner accountable. In this case however, there was a peculiar relationship between the potential 'salvor' and those in distress.[145] Failure to 'rescue' and the potential liabilities which may flow from such failure, should be determined not by the maritime law of salvage, but by the law of delict.

140 *The Toyo Maru* [1971] 1 Lloyd's Rep 341 (HL).

141 *The Kenora* [1921] P 90.

142 *The Scindia* (1866) 2 MLC (OS) 232. See also *The Clan Sutherland* [1918] P 332.

143 *The Atlas* (1862) Lush 518 and *The Port Caledonia* (1903) PD 184. This was a factor in the salvage of the *Amoco Cadiz*, where her master was alleged to have been tardy in accepting salvage, and the salvors were also alleged to have been overbearing in their demands for Lloyd's Form. See further, §7-6.

144 *The Antoinette: Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957 (2) SA 256 (SCA).

145 See a discussion of the case in Boberg *The Duty to Rescue* (1982) 11 BML 194 and 230.

§7-4.4.2 The Salvage Convention and salvor's misconduct

Article 18 of the Salvage Convention deals with misconduct:

> 'A salvor may be deprived of the whole or part of the payment due under this convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has been guilt of fraud or other dishonest conduct.'

In simple terms, if one vessel causes a predicament in which another vessel requires salvage, the errant vessel may be deprived of salvage, or may be entitled to a lesser award for salvage. The Article delimits the common law by requiring that the fault or neglect of the salvor should be such as to have occasioned the salvage in the first place, or to have made salvage more difficult. Where the negligence of the salvor does neither, but perhaps only causes other losses to the salved vessel's owners (such as by excessive delay caused by the fault of the salvor) it is doubtful that the shipowner would be able to invoke Art 18 to reduce the award. The shipowner's rights would be limited to a counterclaim for damages caused to it by the salvor's fault.

The conduct of the salvor should still be tested against ordinary common law principles of fault and negligence, but in so doing, a court should also now take into account the specific convention duties of the salvor, as set out in Art 8. Article 8(1) confirms that the salvor shall owe a duty of care to the owner of the vessel or any other property in danger. The salvor is then obliged to carry out the salvage operations with due care, seeking assistance from and accepting intervention of other salvors.

Where a salvor has been negligent and has 'thereby failed to prevent or minimise damage to the environment', it may be deprived of the whole or part of any special compensation due under' Art 14.[146]

§7-4.4.3 Salvors and Pollution

Salvors may be either independent operators, opportunistically intervening on a voluntary basis to save property in danger, or they may be engaged as contractors under a salvage contract. In the latter event, the terms of the contract will determine whether the salvors are servants of the salved property or whether they remain independent contractors. In any of these capacities, salvors may cause pollution. Where there is a master/servant relationship between salvor and shipowner, liability for such pollution may be vicariously attributed to the shipowner as the salvor's employer. The shipowner would then be bound to make good proven losses in accordance with the regime

146 Upon which see §7-8.

applicable in the jurisdiction where the pollution occurs – in South Africa in the Marine Pollution (Control and Civil Liability) Act, 1986.[147]

The shipowner would have a right of recourse against the salvor, and the latter, where an independant contractor or an opportunist intervener, would as owner of the salvaging vessel, incur a personal liability under the Marine Pollution Act for pollution damage. The salvor should in appropriate circumstances be able to limit its liability under the Act (which at this stage reflects the CLC limits),[148] according to the tonnage of the salvaging vessel (not the tonnage of the vessel from which the pollution stems).

§7-5 Life Salvage[149]

By strange contrast to the philanthropic approach of Admiralty jurisdiction in rewarding those who have gratuitously come to the aid of maritime property found in danger at sea, Admiralty's munificence was not extended to reward the saving of life where there was no property also salvaged. Life salvage would only be awarded ancillary to property salvage, but gave rise to no cause of action in its own right. The leading case on traditional life salvage in Britain is undoubtedly *The Fusilier,*[150] in which the *Fusilier* ran aground in heavy seas on the Girdler Sands off Margate, with 95 passengers on board. The crews of a tug and a lifeboat managed to rescue all the passengers before refloating the vessel the following day. One of the issues which arose was whether an increment for life salvage should be borne by all the salved interests, ship cargo and freight. The case was decided by Dr Lushington and then taken on appeal to the House of Lords. Dr Lushington summarised the traditional law of salvage (prior to the enactment of statutes enabling a claim to be made for life salvage in its own right) thus:

> 'Where no property had been saved, and life alone had been preserved from destruction, no suit for salvage reward could be maintained. One reason for this state of the law was, that no property could be arrested applicable to the purpose. There could be no proceeding *in rem*, the ancient foundation of a salvage suit. In some cases it happened that one set of persons exclusively saved life, and another wholly distinct set saved the ship and cargo; but in this case also the salvors of life could not render the property amenable to their claims. But where life and property had been saved by one set of salvors, it was the practice of the Court to give a larger amount of salvage than had the property only been saved; and this doctrine rests on high authority. The practice, too, was that all the property

147 The International Convention on Civil Liability for Oil Pollution Damage, 1969.

148 See further §11-2.

149 See generally, *Kennedy, op cit* §223-260; Thomas *Life Salvage* JML&C 1978; and cf Boberg *The Duty to Rescue*, *supra.*

150 *The Fusilier* (1865) Br & Lush 341.

saved should be liable to pay such increased rate of salvage, the ship, the freight, and the cargo, each in proportion to its value.'[151]

Where property salvage was accompanied by the saving of life, the court would use the life salvage efforts to enhance the property salvage award, and the enhancement for life salvage was payable not only by the owners of the ship, but also by owners of cargo and freight.[152] This principle was again upheld in *The Cargo ex The Sarpendon*.[153]

The court would also recognise a contract made for the 'salvage' of endangered lives.[154] Thus in *The Medina*[155] Phillimore J allowed a contract to save the lives of 55 pilgrims stranded on a rock in the Red Sea, but reduced the amount of the agreed reward because the master of the salvaging vessel, the *Timor,* had coerced the *Medina's* master into signing an agreement to rescue for an unconscionably high reward. In awarding £1 000 for life salvage, the learned judge remarked that

'had the master not saved the pilgrims he would have been in no better position than a pirate. But there was still a salvage contract. Although there was a valuable salvage service, £4 000 was an excessive reward'.

Following a long line of English statutes beginning in 1846,[156] the South African Wreck and Salvage Act, 1996, provides in s 15:

'(1) Salvage shall be payable to the salvor by the owner of the ship or the owner of any wreck, whether or not such ship or wreck has been saved, when services are rendered in saving life from any ship.

151 *Ibid*, at 393.

152 *Ibid,* at 394. Confirmed on appeal by the House of Lords per Lord Chelmsford at 398:

'The object of the Legislature in the different sections [of the statutory confirmation of life salvage contained in the then British Merchant Shipping Act, 1854] referred to seems to have been to give a legislative sanction to the practice of the Court of Admiralty of indirectly rewarding salvors for the preservation of Human life, by allowing the value of their services to be made for the subject of a distinct estimate, but without intending to fix the responsibility of payment upon one class of owners of property involved in the common peril, more than on another.

153 *The Cargo ex The Sarpedon* (1877) 3 PD 28. Phillimore J said:

'The liability to pay a reasonable amount of salvage to life salvors is imposed upon owners of cargo as well as upon owners of the ship. Such liabliity is not a general personal liability to be enforced in any circumstances, whether the ship and cargo are lost or not, but a liability limited to the value of the property saved from destruction.'

154 *Kennedy, op cit* at §234 opines that it is more accurate to regard such a contract not as a salvage contract (because no property is required to be salvaged) but rather a 'contract in the nature of salvage'.

155 *The Medina* (1876) 1 PD 272. See also *The Lomonosoff* [1921] P 97.

156 The Wreck and Salvage Act (1846) 9 & 10 Vict c 99 s 19.

(2) Notwithstanding anything to the contrary contained in the Convention, the payment of salvage in respect of the preservation of life shall have priority over all other claims for salvage.

(3) When the ship or wreck is lost or the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage payable in respect of the preservation of life, the Minister may, in his or her discretion, award to the salvor, out of moneys made available by Parliament for the purpose,[157] such sum as he or she thinks fit, in whole or part satisfaction of any amount of salvage so left unpaid.

The section refers to the liability of 'the owner of the ship', presuming that persons shall be on a ship when saved. It then provides an alternate, but not additional liability of 'the owner of any wreck', which, by definition, could include cargo.[158] To the extent that the section does not make clear the correlative liability of ship cargo and freight for the payment of life salvage, this wording is contrary to the traditional principles of life salvage. It does, however, clearly alter the traditional principle that life salvage is not claimable unless propoerty also be saved. The clear effect of the wording is that a cause of action for life salvage arises in its own right, against the owner of a ship, including a wrecked ship, whether or not that ship herself be salvaged. Not clear is whether such a claim for life salvage may be brought against ship, cargo and freight. The somewhat vague wording of the section may benefit from an analysis of the common law which the section sought to change. In that context, the alternative expressed as 'or' may demand an adjuctive 'and' interpretation.

The Salvage Convention and life salvage

Article 16 of the Salvage Convention leaves the question of life salvage open for regulation by national laws. It confirms the humanitarian principle that those whose lives are saved at sea should not be called upon to pay any price for their rescue:

> 'No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject.'

The Convention then confirms the traditional enhancement principle thus:

> 'A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to

157 No monies have yet been allocated by Parliament for the payment of life salvage. The life salvage provisions have been in force since the Merchant Shipping Act, 1951 which came into effect in 1960. Section 300 of the Merchant Shipping Act, 1951 Act dealt with life salvage. It was repealed by the Wreck and Salvage Act, 1996. There is now no distinction drawn between local and foreign ships. The new section applies to all ships, and life salvage rendered anywhere.

158 The Act, in s 1, defines wreck as including cargo or any portion thereof.

the salvor for salving the vessel or other property or preventing or minimising damage to the environment.'

Under the Convention, the life salvor thus becomes a stakeholder in the success of property and environmental salvage, though he or she may not stake a claim for life salvage without it being ancillary to property salvage.

§7-6 THE TANKER PHENOMENON: FUNDAMENTAL CHANGES IN TRADITIONAL SALVAGE

When we looked at the general principles of salvage, we found that one of the essential elements was success. Without success, there can be no salvage service warranting reward. Perhaps the salvor may only make a contribution towards that success as a co-salvor; or it may be replaced by a second salvor; but at the end of the day, for there to be a salvage service giving rise to a salvage award, there must be success. The salved property must survive the salvage, and indeed be placed in a better position than it was at the commencement of the salvage services. The salvor, as Lord Phillimore said, must make a 'meritorious contribution towards ultimate success'.[159]

But we saw also that one of Dr Lushington's 'many and diverse ingredients' of a salvage service is the reduction of risks to third parties to the extent that the owner of the salved ship may be liable for them: in other words the lessening of a salved ship's potential liabilities to third parties is a factor affecting the assessment of the salvage reward.

The minimising of the deleterious effects of a marine accident upon innocent third parties does not however give rise to any special rights of claim against those third parties. The claim lies against the salved property only. *Kennedy*, as we saw, thus regarded these risks as 'collateral' to the danger to the salved vessel, whereas *Brice* leans towards looking at these services as possibly founding a claim against the salved ship, in their own right. The result of both approaches however is an enhancement of the salvage reward.

And regardless of who the ultimate beneficiary of these salvage services is, traditional salvage has given the salvage reward to the salvor at the cost of the salved property and not against other thirdparty interests nor against their insurers.

159 *The Melanie v The San Onofre* (1925) AC 246 (HL). See also the South African cases of *The Cervantes and The Batavier: Hartjie v Maasdyk* (1876) 6 Buch 102 at 212 in which the court awarded a *quantum meruit* for partial salvage, applying *The Charlotte* (1848) 3 WRob 68 and *The Scindia* 2 MLC (OS) 232. Similarly in *The Georgetta Lawrence and The Calcutta* (1878) 8 Buch 102 at 105. [*Caveat* s 6 of the Admiralty Jurisdiction Regulation Act.]

Where the same salvage service gives more benefit to one salved property interest than to another (as for example in *The Velox*,[160] where herrings were in danger of spoiling because the ship had run short of fuel, but the ship herself was in little or no danger) then the award should be proportionate to the degree of danger to which each such property interest was exposed.[161] Each such interest individually thus comprises the salved fund collectively. And the salved fund pays the bill. If there be no success, there is no salved fund and therefore no award, regardless of how meritorious the services were. The underlying principle was expressed in Art 2 of the 1910 Brussels Convention on Salvage: 'In no case shall the sum to be paid exceed the value of the property salved'. This was a significant limitation on the general principle expressed in Art 2 of that Convention: 'Every act of assistance or salvage which has had a useful result gives a right to equitable remuneration'.

The salved property might have a value too small to support equitable remuneration for services giving the most useful results. And, more inequitably, there may be no salved property but there may nevertheless have been very costly, useful services rendered by the salvor in attempting to salvage the vessel and her cargo which in themselves lessened the liabilities of the vessel which was lost notwithstanding. Although these liabilities survive the vessel, the salvor's claim dies with it.

Consider the tanker phenomenon: the average 270 000 ton VLCC has a cargo the value of which could exceed the value of the ship. The total salved fund of a laden VLCC, comprising ship, cargo and freight, is thus likely to be considerable, and the arbitrator when assessing the award should take into account the potential liabilities that have been saved the shipowner. Applying *The Velox* however, it is only the award against the ship which should carry the enhancement. For it is the ship which, in terms of most oil pollution legislation, carries the liability for pollution.[162]

Under the regime of traditional salvage law and the 1910 Convention, salvors complained (and justifiably) that the enhancements given for prevention of ecological disasters were too small and too arbitrary. Indeed the 1910 Convention made no mention of the saving of liabilities or the avoidance of ecological damage as factors to be considered in the assessment of the award.[163]

160 *The Velox* [1906] P 263.

161 See further discussion in *Brice, op cit* at 320.

162 Cf *Brice, op cit* at §4-27 where he concludes that *The Velox* principle is 'decidedly open to question'. *Brice* concludes that the liability enhancement should be borne rateably according to values.

163 The *Latirus* is perhaps an example. She was a fully laden Shell tanker which was disabled off the Cape of Good Hope. Her salvors employed a specialist tug, operated by specialist professional salvors with considerable experience and skill. They salvaged the *Latirus* from a position in which she was bound to run aground, there being argument only as to whether this would have been sooner rather than later. She was totally disabled with no prospect of repairing herself in time to avoid grounding and with no power to drop her anchors. The bottom was ragged and foul. She would not have come off easily once some oil escaped and her residual buoyancy was reduced. Values

In trying to assess awards for salvage in which environmental damage was averted, arbitrators faced great difficulty in reducing the potential of the disaster and its probable liabilities to money terms. For traditional salvage law required the danger to be 'real and sensible' and not purely a question of fancy.[164] Dr Lushington, to whom the concept of a 400 000 ton VLCC would have been science fiction, talks in *The Phantom*[165] of a 'reasonable apprehension' in relation to the danger in which the vessel finds herself'. Presumably the same could apply to the probability of liabilities. But traditional salvage concepts could not embrace the tanker phenomenon and its catastrophic possibilities. Indeed the shipping world itself hid from the realities of a major onshore crude oil spill. The situation was far from perfect. Arbitrators and the courts seemed reluctant to lay down guidelines for the calculation of the enhancement under the 1972 Lloyd's Form terms, and, as the onus of establishing danger rested firmly on the salvors, voluminous salvage claims outlining the potential catastrophic effects of a salvage incident were lodged – volumes which in turn had to be met with equally voluminous counter arguments that the envisaged results were speculative fancy.

The problem did not end with an inconsistent approach to enhancement against the salved fund: Should the arbitrator consider the limitation of liability of the salved ship which would reduce that ship's potential exposure dramatically? Should the P&I Club liability insurers, who would in reality foot the bill, contribute? Should not the oil companies who own the cargoes and who stand to gain the most from their successful delivery stand up and be counted in the payment of salvage enhancements arising from threats to the environment posed by their cargoes even though they are not themselves primarily liable for pollution emanating from the ship? And perhaps the most important question of all, what about rewarding the salvors in a situation where they spend a fortune in time and money attempting to save a tanker and her cargo without ultimate success, or worse, in circumstances where the shipowner and possibly the salvors themselves are prevented from securing a 'salved fund' by governmental intervention. No salved fund, no salvage. No salvage, no salvors. Something clearly had to be done.

The situation was brought to a head by the grounding of the *Amoco Cadiz* in 1978. The master, allegedly tardy in calling for and later accepting help, was reluctant to sign the old Lloyd's form.

were agreed at £19,288 million, and the Lloyd's arbitrator on a pre-LOF 1980 gave LMS £225 000 or 1,16% of the salved values. This was scant enhancement. A similar quantity of crude oil on board the *Amoco Cadiz* (220 000 tons) which grounded on the Brittany coast in March 1978 gave rise to liabilities of over $5 billion. Salvage of the *Amoco Cadiz* would have saved the shipowner potential liabilities of $5 billion. Yet the total of the *Latirus* award, involving the potential spill of a greater quantity of crude oil, was £225 000 or approx $700 000 a

164 *The Helmsman* (1950) 84 Ll Rep 207.

165 *The Phantom* (1866) LR 1 A & E 58 at 60.

The salvage tug master was criticised by some as having purposely waited for the vessel to get into a position of real danger – he held back, so it was suggested, until the danger to the vessel was immediate, the loss of cargo probable, and the risk of pollution would be unequivocal. Even once a Lloyd's Form was agreed, there was reportedly the bare minimum of co-operation between the tanker crew and the salvors. The master was reluctant to call in other salvors to help the first salvor when it had become clear that the first could not succeed alone; and the salvors, when help became available, were reluctant to accept that help for fear of having to share their award. The results were cataclysmic.

Under pressure from the professional salvors who, with Lloyd's, were working on a new Lloyd's Open Form, The International Consultative Organisation (IMCO, as it then was) decided to take the initiative in examining where traditional salvage laws were falling shy of modern requirements. And the CMI[166] offered its services to IMCO to establish a study group. In June 1979 work commenced and the committee identified the following problem areas, very much exemplified by the *Amoco Cadiz*:

- Regulation of duties of the vessel in distress, particularly the duty to take timely action to call in a salvor; the duty to co-operate with salvors; the duty to require or accept other salvors' services when the first salvor cannot complete them alone; and the duty to accept delivery of the salved property at a safe place.
- Regulation of the salvor's duties, particularly the duty to use his best endeavours to salve the vessel as speedily as possible and to minimise damage to the environment; and the duty to accept the co-operation of other salvors when circumstances reasonably so require.
- The provision of an incentive to salvors to expend time and effort to minimise danger to the environments where there is little prospect of success and therefore of a fund.
- Widening the notion of 'salved vessel' in traditional salvage law to include vessels stranded or sunk (but still excluding wreck removal).
- Preserving salvors' rights in cases of state intervention and imposing upon states the duty to allow salved vessels in distress (described by the International Salvage Union as 'maritime lepers') into their ports where this is reasonable.
- Expanding the notion of interference with a contract *ex post facto* where undue influence is exerted either by the salvors or by the danger itself, or where the contract provides in any event for a reward excessively large or small.

166 *Comite Maritime International,* representing the world's Maritime Law Associations.

- Ensuring that professional salvors particularly are assured that their substantial costs will be met in all circumstances, and further that awards are of a size to encourage professional salvors to stay in the market.
- Helping the salvor, who often has to wait two years for his award to be processed, to improve his cash flow by interim awards, at least covering the salvor's costs.
- Streamlining the provision of salvage security, particularly on behalf of cargo.
- Governing the effect of salvor's misconduct in the three situations:

(a) where the salvage operations result from the salvor's fault or neglect (eg collisions);

(b) where they become more difficult because of his fault (eg the *Toyo Maru*); and

(c) where the salvor's conduct has been improper or dishonest.

- Allowing a salvor to avail itself of the 1976 London Convention on the Limitation of Maritime Claims when its negligence exposes it to liability in states which are not a party to the London Convention (which applies to salvors).

The CMI committee, with the above aims in mind, produced the 1981 draft salvage convention for discussion at a special meeting convened in Montreal in May 1981 at which representatives

of most of the world's Maritime Law Associations, the International Salvage Union,[167] the P&I Clubs and the hull insurance markets were present. The ISU argued strongly for recognition of 'liability salvage' in its own right.[168] The P&I Clubs, as 'liability insurers' of the world's tanker fleets, did battle with the ISU;[169] the cargo underwriters fought hard against an attempt to bring them into the funding of 'enhancement' of awards;

The International Convention on Salvage, signed at London in 1989, was the culmination of this clash of maritime titans, and of their compromises. In relation to the saving of liabilities for environmental damage, it followed the format of the Lloyd's Open Form 1980 and its 'safety net', embodying a 'no-cure-some-pay' principle in relation to environmental liability.

§7-7 Lloyd's Standard Form, LOF 1980 and the safety net[170]

After the *Amoco Cadiz*, and at the same time as the CMI began its discussions with IMCO, the ISU formed a working party under Gerald Darling QC to consider changes to the 1972 (then

167 The ISU represents the world's principal deep water salvors. For full information about the ISU and its current membership, see their website at <www.isu.com>.

168 Tony Wilbraham, then President of ISU, at a Lloyd's seminar on the LOF 1980 in September 1980, expressed the ISU's view thus:

> "Salvors [are] looking for what they regard as proper recognition of the services they provide in preventing pollution within existing well established salvage practice. In other words they [are] looking to the acceptance of 'liability salvage' and the establishment of a separate fund out of which the salvor would receive an award additional to and separate from the property salvage award, but on the same kind of 'no cure, no pay' basis. ... Arbitrators are able to enhance awards where the prevention of the escape of oil is a relevant part of the services provided. The concept of 'enhancement must be regarded as clear recognition of the principle of 'liability salvage', but it is concealed in a form of words to make it more palatable for some of the interests involved. It is the salvor's view that this principle must be given more strength and recognised fully and openly.'

169 The view of the Clubs was given by Terence Coghlin, of the UK Mutual P&I, in his reply at the same Lloyd's Conference:

> 'Traditionally, hull and cargo underwriters have covered successful property awards, including any 'enhancement' of these awards in respect of life salvage, or because of the particular difficulties attendant on the cargo being carried in the ship. They remain prepared to do so against the agreement of the Clubs to meet the guaranteed 'safety net' no cure – some pay awards where there is no success and no salved fund. To introduce a new concept of 'liability salvage' is both unnecessary and potentially harmful to those engaged in salvage situations and could lead to certain salvage operations not taking place at all. The arbitrator in assessing liability salvage would in effect have to have a trial within a trial of all potential liability claims – consequential or otherwise, at an absurd level of speculation and the delays in settling awards would prejudice salvors enormously. And perhaps more simply, the best way to prevent pollution is to stop the oil from escaping from the ship. The best way to do this is to salvage the ship and its cargo, and this should be the main motivation of and encouragement to salvors. The alternative would result in a double payment to the salvor: once for saving the ship and cargo, and again for preventing the cargo from escaping.'

170 See generally, Thomas *Lloyd's Standard Form* [1978] LMCQ 276; Bessemer Clark *LSF 1980* [1980] LMCQ 297; Miller [LOF 1980] JML&C 1981 243; Coulthard *A New Cure for Salvors? – LOF 1980 v The CMI Montreal Draft Convention* JML&C Vol 14 No 1 Jan 1983; Brice *Salvage & Enhanced Awards* [1985] LMCQ 41.

current) edition of Lloyd's Standard Form of Salvage Contract.[171] Lloyd's Form, used since 1890 and first published in 1908, had changed little since its first draft. But it, like the traditional salvage law which it reflected which was destined for review at Montreal and London, could not cope with the assault on the environment posed by tankers and their cargoes.

The objects of Lloyd's Open Form were not to be changed:

- To provide a well known, though not altogether well loved document, readily available in an emergency, and generally approved by shipowners as a last resort for their masters in distress.
- To give salvors a means of getting security for their claims without resorting to the arrest of the salved vessel or her cargo.
- To provide a speedy, cost effective tribunal of experts in the field of salvage to assess salvage awards.

But there were now three main areas of improvement apparent:

- the encouragement – or rather the financial inducement – of salvors to use their best endeavours to salvage oil tankers even where there is little or no chance of success, with the view to minimising the damage to the environment.
- the inducement of cargo interests which are now often worth far more than the vessel, to put up security for their share of salvage with the minimum of delay, and
- improving the limitation of a salvor's liabilities in the light of the considerable increase in exposure during modern day salvage operations.

After much discussion in many committees set up by Lloyd's and the ISU, the principle of the 'Safety Net' was devised in preference to a separate fund of 'liability salvage' in cases of environmental damage resulting from tanker casualties. The Safety Net was a substantial modification of the traditional requirement of success: it created a 'no-cure-some-pay' guarantee that the salvor would have at least his costs met where:

(a) there is salvage of a tanker laden or partly laden with a cargo of potentially pollutant oil; and

(b) the salvor is free of negligence; and

171 Generally referred to as 'LOF'.

(c) the services are not successful, or are only partially successful so that there is no fund from which the salvor may be paid an award.

In those limited circumstances the salvor under LOF 1980 could claim its 'reasonably incurred expenses' and an increment of up to 15%. Clause 1(a) which introduced the safety net exception to the no cure – no pay principle, included out of pocket expenses and a fair rate for all tugs, craft, personnel and other equipment used by the salvor. The ISU makes it clear that no profit is envisaged, but a well documented and vouched costs assessment can surely give the salvor some profit above his overheads which are of course not 'out of pocket' expenses.

The safety net compromise, which in turn paved the way for the 1989 Convention's special compensation, came about largely through a compromise between hull & machinery and P&I insurance. Property salvage was traditionally paid by H&M and cargo underwriters, and not by the P&I Clubs as the vessels' third party assurers. In exchange for the agreement of hull and cargo underwriters to continue to pay salvage, and also to meet any enhancement of property salvage awards by reason of environmental damage being averted, the International Group of P&I Clubs agreed to meet the whole safety net bill and to provide security to salvors where safety net services are rendered to P&I entered vessels. The Clubs thus included the safety net salvage claim under their members' cover.[172]

The LOF 1980 has since been updated by a 1990 and a 1995 Lloyd's Form. A specimen is appended as Appendix 10. The principal terms are

(a) The salvor shall use its best endeavours to salvage ship and cargo and (since 1980) bunkers and stores, and shall use his best endeavours to prevent the escape of oil. [Clause 1(a)(i)]

(b) The salved vessel shall co-operate fully with the salvor during the salvage and in 'obtaining entry of the vessel into a place of safety', and the salvor may use gear on board the salved vessel. [Clause 2]

(c) The master signs the contract on behalf of the ship, her cargo, freight, bunkers and stores. [Clause 16][173]

172 The Clubs, who represent and defend most of the world's shipowners against all legal liabilities including salvage, also agreed, as did hull and cargo underwriters, that they would not put up defences of salvage claims brought under LOF 1980 on the basis that the speculative nature of salvage had been reduced by the guarantee of at least part of the salvor's costs under the safety net clause.

173 This power to bind other salved interests to the contract is reiterated by Art 6(2) of the Salvage Convention:

> 'The master shall have the authority to conclude contracts for salvage operations on behalf of the owner of the vessel. The master or the owner of the vessel shall have the authority to conclude such contracts on behalf of the owner of the property on board the vessel.'

(d) Subject to the statutory provisions of the Salvage Convention relating to Art 14 special compensation, the salvage services 'shall be rendered and accepted as salvage services upon the principle of "no cure – no pay"'. [Clause 1(b)]

(e) The ship owner may terminate the salvage services 'when there is no longer any reasonable prospect of a useful result leading to a salvage reward in accordance with Art 13'. [Clause 4]

(f) The salvor shall direct security demands through the Committee at Lloyd's, but direct to the shipowner where possible, and security is then lodged at Lloyd's. The salvor shall have a maritime lien on the salved property until then, but undertakes not to arrest the vessel for 14 days after termination of the salvage, unless it has reason to believe that the property is to be removed in contravention of his lien. [Clauses 5 and 6][174]

(g) The shipowner undertake to use its best endeavours to procure the agreement of cargo interests to provide security for cargo's *pro rata* share of salvage, and the salvors may call for security for special compensation in addition to normal salvage. [Clause 5(b)][175]

(h) The salvage award will be fixed by arbitration in London under the auspices but without the active involvement of the Committee of Lloyd's.

(i) The currency of the award may be agreed, failing which it shall be in sterling. [Clause 1(e) and (f)] and the contract is governed by English Law 'including the English law of salvage'. [Clause 1(g)]

(j) An interim award may be made. [Clause 10(a)(iv)][176]

(k) Arbitration and appeal procedures are laid down. [Clauses 7 – 10][177]

There is no longer any specific provision relating to the right of the salvor to limit its liability as there was in the 1980 Lloyd's Open Form. As the contract is subject to English law, and to be

The common law sought to accord the master this authority by a mixed application of theories, including *negotiorum gestor*, agent of necessity and *stipulatio alteri*. See further §5–2.

174 See §7-10.

175 Previous to *The Greystoke Castle* [1947] AC 265, shipowners usually lodged security on behalf of cargo. From then on, shipowners became increasingly reluctant to do so.

176 This right is entrenched in the Salvage Convention, Art 22.

177 See further §7-10.

enforced in England, the English law of limitation which incorporates the provisions of the 1976 Limitation Convention will however apply.[178]

§7-8 The International Convention on Salvage, 1989 – the new regime for saving the environment

The Lloyd's Form 'safety net' has been reiterated as the current law by the 'special compensation' provided for in Art 14 of the Salvage Convention:

> '(1) If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under Art 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.
>
> (2) If, in the circumstances set out in paragraph (1), the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph (1) may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph (1), may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.
>
> (3) Salvor's expenses for the purpose of paragraphs (1) and (2) means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation taking into consideration the criteria set out in article 13, paragraph 1 (h), (i) and (j).
>
> (4) The total special compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under Art 13.
>
> (5) If the salvor has been negligent and has thereby failed to prevent or minimise damage to the environment, he may be deprived of the whole or part of any special compensation due under this article.
>
> (6) Nothing in this article shall effect any right of recourse on the part of the owner of the vessel.'

Special compensation under Art 14 may only be claimed where the salvor 'has failed to earn a reward under Art 13 at least equivalent to' the special compensation the salvor stands to receive under Art 14. It is 'subordinate to the Art 13 reward and its function should not be confused

178 Under English law the salvor may limit its liability according to the 1976 Convention on the Limitation of Liabliity for Maritime Claims. See further §11-1.2

by giving it a character too closely akin to salvage'.[179] But it is not limited to situations where the salved fund is insufficient to meet an Art 14 award. It may be that the arbitrator has simply awarded 'normal' salvage under Art 13 which does not properly compensate the salvor for its Art 14 expenses. The *Attachment* to the Salvage Convention removes any doubt that it is not necessary to excuse the Art 13 salved fund before Art 14 special compensation is claimed:

> 'It is the common understanding of the Conference that, in fixing a reward under Art-13 and assessing special compensation under Art-14 of the International Convention on Salvage, 1989 the tribunal is under no duty to fix a reward under Art-13 up to the maximum salved value of the vessel and other property before assessing the special compensation to be paid under Art 14.

The Art 14 special compensation award is payable only by the ship, and not by the cargo or freight, even where the threat of environmental damage derives solely from the cargo.

The right to claim special compensation under the Salvage Convention arises only where there has been a threat of damage to the environment, which is defined in Art 2(d) as 'substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents'. South Africa, in enacting its Wreck and Salvage Act to which the Salvage Convention is a schedule, recognised the limitations of restricting such environmental damage to coastal or inland waters, and thus proclaimed an extension of the definition of environmental damage, as it would apply in South African enforcement proceedings or to salvage operations or contracts to which South African law applies, as follows:

> '*Damage to the environment* as defined in article 1 of the Convention shall for purposes of this Act, notwithstanding anything to the contrary contained in this Act, not be restricted to coastal or inland waters or to areas adjacent thereto, but shall apply to any place where such damage may occur.'[180]

Mindful of the preamble of the Salvage Convention:

> 'The states parties to the present convention, … Convinced of the need to ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger',

South Africa has also taken a pro-active route in enacting clarification of the meaning of a 'fair rate' to be paid to a salvor in terms of Art 14(3). Since the compromise wording of the Salvage Convention was agreed, salvors have endeavoured to include in their assessment of 'out-of-pocket

179 *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323 (HL).

180 Wreck and Salvage Act, 1996, s 2(7).

expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation' an element of profit. They have maintained that a fair rate for equipment and personnel should perforce be one which is market related, and which accordingly reflects reasonable profit.

In *The Nagasaki Spirit,*[181] the owners of the vessel challenged the salvor's inclusion of profit in their claim for special compensation. The *Nagasaki Spirit*, 95 997 tons dwt, had been badly damaged in a collision with the *Ocean Blessing* in the Malacca Straits, with great loss of life. The *Nagasaki Spirit* spilled about 12 000 tonnes of crude oil in the accident, but the vessel and the remaining cargo were saved. The *Ocean Blessing*, with all her crew, were lost. The salvors of the *Nagasaki Spirit* claimed both Art 13 and Art 14 salvage. The arbitrator found for the salvors and awarded them an Art 14 reward which included profit as part of a 'fair rate' for personnel and equipment used in the oil pollution prevention operation. The appeal arbitrator regarded the special compensation only as a safety net, and not as a separate type of salvage remuneration, and the Commercial Court and the Court of Appeal generally upheld the appeal arbitrator, excluding profit. This view was confirmed by the House of Lords. In his judgment, Lord Mustill QC found:

> 'I do not accept that salvors need a profit element as a further incentive. Under the former regime the undertaking of salvage services was a stark gamble. No cure – no pay. This is no longer so, since even if traditional salvage yields little or nothing under Article 13 the salvor will, in the event of success in protecting the environment be awarded a multiple not only of his direct costs but also the indirect standby costs, yielding a profit. Moreover, even if there is no environmental benefit he is assured of an indemnity against his outlays and receives at least some contribution to his standing costs. Lack of success no longer means "no pay" and the provision of this safety net does suffice … to fulfil the purposes of the new scheme.'

The House of Lords shied away from providing a clear formula for the calculation of a 'fair rate'. That will be left to the arbitrators and the courts. However salvage claims enforced in South Africa, or elsewhere according to South African law, will prefer the findings of the original arbitrator in *The Nagasaki Spirit*, and will allow the salvor to claim a fair rate for personnel and equipment charged out at 'prevailing market rates … for work of a similar nature'.

The International Salvage Union is not satisfied with the way in which Art 14 has been applied by the courts, and were clearly unhappy with the House of Lords' interpretation of a 'fair rate' in *The Nagasaki Spirit.* The ISU continues to lobby for a greater focus on environmental salvage, and to

181 *The Nagasaki Spirit, supra.*

do so has launched its *Salvage 2000* initiative.[182] *Salvage 2000* is underpinned by a prior agreement between the ISU and P&I Clubs settling pre-determined market rates of remuneration for Art 14 compensation, and envisages the use of an *allonge* to a Lloyds Open Form agreement to give effect to the changed methods of Art 14 assessment and application.[183] The salvor would be able, unilaterally, to invoke a market related formula of Art 14 compensation at any stage of the operation. The P&I Clubs, in return, would have a greater say in the conduct of the salvage. To give effect to *Salvage 2000*, the P&I Clubs have sponsored what is known as the 'SCOPIC' clause for Lloyds Open Form.[184] The final form of SCOPIC remains to be settled, but its proposed content is summarised thus:[185]

- SCOPIC may be incorporated into a Lloyd's Open Form contract by agreement between the parties. It is not intended to be compulsory;
- The provisions of SCOPIC will be acceptable to the International Group of P&I Clubs, who will agree to a code of conduct giving Club backing to its proposals;
- SCOPIC does not do away with Special Compensation, but merely replaces its method of assessment;
- SCOPIC remuneration may be invoked at any time during a salvage operation by the salvor;
- As soon as SCOPIC is invoked, the shipower must provide a guarantee for $3 million within 2 working days;
- SCOPIC remuneration will be assessed according to tariff rates;
- If SCOPIC remuneration is exceeded by the Art 13 property salvage remuneration, the Art 13 award will be discounted by 25% of the difference between the Art 13 award and the SCOPIC assessment;

182 The view of the ISU is that 'the world places protection of the environment at a level far above property salvage', and salvage awards should reflect this changed value system. See Witte *Salvage 2000: New Options for Contracting Salvage Services*, an ISU position paper presented to the 15th International Tug and Salvage Convention, November 1998.

183 The proposals include the extension of Art 14 remuneration to beyond coastal waters, such as the South African Wreck and Salvage Act has already done. Mr Witte, as the current president of the ISU, calls for an integration between shipowners and salvors noting:

> 'There is no room for the yellow page, itinerant salvor, who comes on the scene with his brother-in-law, two off-duty firemen and the lowest price. The social, political and economic cost of delay coupled with poor judgment is just too great for a trial and error approach by inexperienced entrepreneurs lured by a high risk reward at potential environmental expense.'

184 Special Compensation P&I Clause.

185 From the paper delivered by Archie Bishop, legal advisor to the ISU, at the 15th International Tug and Salvage Convention, November 1998.

- As soon as SCOPIC is invoked, the shipowner can appoint a Special Casualty Representative (SCR) to monitor the salvage services and be kept fully advised as to how the operation is to be carried out;
- Once the SCOPIC clause has been invoked, the LOF can be terminated either by the salvor if the overall cost to him, less any SCOPIC remuneration, is greater than the value of the property saved, or by the shipowner after giving 5 days notice to the salvor.

It would appear likely that the shortcomings of the Salvage Convention will be addressed at this stage consensually by the parties, rather than by amendment. The next step of the salvor towards its long-standing goal of the recognition of environmental and liability salvage as a cause for an award in its own right is thus likely to be LOF 1995, coupled to a SCOPIC agreement.

§7-9 Submission and preparation of salvage claims

A salvage claim stands or falls on the availability and presentation of fact. It is usually submitted by means of a 'bundle' of documents submitted to an arbitrator, which bundle in turn elicits a bundle of documents and submissions in reply from the shipowner. Clearly, the salvor seeks to maximise the danger and the effort expended, while the shipowner rebuts by denying that the danger was immediate or indeed real, and averring that the salvor's efforts were routine. The arbitrator seeks a balance.

In reality, where claims are submitted to arbitration by a Lloyd's Arbitrator, histrionics on either side are to little avail. An experienced arbitrator (and it is here that arbitration becomes preferable to court proceedings) will sift and see through any overly dramatic presentations. But the nature of many salvage operations has not changed since the days of the 'herioc salvage services' recounted in the Doctor's Commons as so vividly described by Roscoe.[186] It is often difficult not to play on the realities of the drama and the extent of the catastrophe. True heriocs is the stuff of which successful salvage claims are made.

In preparing a salvage bundle, the salvor would seek contemporaneous evidence of the nature of the vessel and her cargo, and the predicament from which she was extricated. Accurate weather records, sea state records,[187] and inshore chart data[188] are invaluable. Photographs and video footage taken during the salvage operation speak volumes. In South African proceedings, whether by court action or by arbitration, maintenance records of the salved vessel may be sought

186 See Chapter 1, §104 fn 62.

187 In South Africa, available from the CSIR.

188 Available from the Office of the Hydrographer of the South African Navy at Silvermine in Cape Town.

through the inspection and discovery procedures of the Admiralty Jurisdiction Regulation Act.[189] Tape recordings of radio communications between the salvor and the salved vessel, and, where legally available, communications between ship and shore, can throw valuable light on both predicament and salvage service. Statements from the crew of the salved vessel, countered by statements from those on board the salved vessel may be submitted. Office records and financial statements, including fixed and variable costs and depreciation, would be needed to support claims for special compensation and for normal Art 13 rewards, for the expenses of the salvor in performing the operation are a criterion which the Salvage Convention requires the arbitrator to take into account. And not least, in the absence of agreement, values of ship, cargo and freight would have to be proved,[190] basing these values on the market value of the property saved at the completion of the salvage operation, and not clean and undamaged as it was before the accident giving rise to the salvage occurred.

Lloyd's arbitrators commonly call the parties together to submit their presentations through their legal representatives. The Committee at Lloyd's publishes 'Procedural Rules' which give practice directions for the conduct of salvage arbitrations.[191] The Rules provide for a meeting to be convened by the arbitrator within six weeks of appointment, to arrange time limits for the submission of evidence, for discovery, for proof of values, and a date for the hearing. Although the arbitrator has the power to call for and hear evidence *viva voce* (a power which would be entrenched in South African proceedings by the Admiralty Jurisdiction Act),[192] this seldom occurs, and most salvage arbitrations are conducted on the papers and the submissions of counsel in argument.

It is possible that salvors present a joint salvage claim, allowing the court or arbitrator to apportion the award between them. Where a court awarded salvage to owners, master and crew collectively, but the master and crew were not before the court, the court declined to apportion the aggregate award.[193] There is no set formula for the division of a salvage award among the owners of the salvaging vessel, her master and her crew. But where owner's contribution to the salvage is minimal,

189 Upon which see §2-7.

190 For which documents would need to be disclosed: *Messina Bros Coles and Searle v Hansen & Scroeder Ltd* 1911 CPD 781.

191 The issue of the Lloyd's Procedural Rules is dated February 1997 and is appended as Appendix 11.

192 Section 5(5)(a)(i) of the Act reads:

> 'If it appears to the court to be necessary or desirable for the purpose of determining any maritime claim, or any defence to any such claim, which has been or may be brought before a court, arbitrator or referee in the Republic, make an order for the examination, testing or inspection by any person of any ship, cargo, documents or any other think and for the taking of evidence of any person.'

The Act, in ss (iv), allows such an order to be granted also in relation to claims brought to court or arbitration elsewhere than in South Africa, but only in 'exceptional circumstances'.

193 *The Mangoro* 1913 WLD 60 at 67. [*Caveat* s 6 of the Admiralty Jurisdiction Regulation Act.]

this will be taken into account, and their part of the claim will be comparatively small.[194] Where a tug owner was prevented from converting a towage contract to salvage because the tug supplied for the service was 'inefficient', the master and crew of the tug were allowed to sever their claims and were awarded salvage, though their owner's claim for salvage was denied.[195] A court may also order that related salvage claims be consolidated into a single action.[196]

Where one ship salvages a sistership, and both belong to the same owners, the master and crew of the salvaging ship may claim salvage against the salved ship, provided that their actions go beyond what could have been expected of them under their conditions of service.[197] Clearly no claim would subsist for owner's share of salvage. A master and crew are not entitled to claim salvage of their own vessel:

> 'It is quite clear that, as a general rule, seaman cannot recover salvage remuneration for services which by their contract they are bound to perform, and, therefore, they never recover salvage remuneration for services connected with the saving of their own ship, as long as the relation of master and servants between them and their owner, with reference to that ship, continues.'[198]

§7-10 Enforcement, Security, Arbitration and Appeal[199]

A salvage claim is one giving rise to a maritime lien. This lien is confirmed both in the Wreck and Salvage Act, s 2(10) of which confirms that 'any claimant under this Act shall be entitled to enforce a maritime lien', and by the Salvage Convention which confirms in Art 20:

> '(1) Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.

194 See *The Jane* (1831) 166 ER 267 per Sir Christopher Robinson:

> 'As to the owners, who are principal parties in these proceedings, the general principle of law is, that the claim of owners generally is very slight, unless, from the circumstances of the case, their property becomes exposed to danger, or they incur some real loss or inconvenience. There was no danger to their property in this case; but in the detention of their vessel, and consequential risk and expenses, I think there is a strong foundation on their part for a claim to share in the salvage.'

195 *The Maréchal Suchet* [1911] P 1.

196 For an early case of apportionment between salvors, see *The L'Esperance* (1811) 165 ER 1227. A joint salvage claim was presented in the Lloyd's Form arbitration of the salvage of the sister tankers *Venoil* and *Venpet*. Consolidation was ordered in *The Andes* (1901) 11 CTR 367 and in *The Politician and The Cromartyshire* (1902) 19 SC 147 in which a runner crew and a tug as joint salvors saved a burning vessel. [*Caveat* s 6 ofthe Admiralty Jurisdiction Regulation Act.]

197 *The Sappho* (1871) 17 ER 238 in which the House of Lords upheld such an award made by Sir Robert Phillimore, and distinguished the earlier judgment of Dr Lushington in *The Marie Jane* 14 Jur 857, which disallowed a claim upon the basis of the custom that masters and crews of ships on the African trade belonging to the same owner were expected in their articles of employment, to render assistance to each other. Thus, in *The Marie Jane,* their services did not go beyond those for which they had been employed, and there was no salvage.

198 *The Sappho* (1871) 17 ER 238 at 240.

199 See generally, Griggs *Arbitration Procedures LOF* International Business Lawyer (1981) at 15-17.

(2) The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.'

The Convention deals in some detail with the provision of security by the shipowner to the salvor. Article 21 provides that:

'(1) Upon the request of the salvor a person liable for a payment due under this Convention shall provide satisfactory security for the claim, including interest and costs of the salvor.

(2) Without prejudice to paragraph (1), the owner of the salved vessel shall use his best endeavours to ensure that the owners of the cargo provide satisfactory security for the claims against them including interest and costs before the cargo is released.

(3) The salved vessel and other property shall not, without the consent of the salvor, be removed from the port or place at which they first arrive after the completion of the salvage operations until satisfactory security has been put up for the salvor's claim against the relevant vessel or property.

The 1995 Lloyd's Open Form has specific provisions as to the provision of security, which both overlap those of the Salvage Convention, and which, in cases of conflict would override the Convention.[200] Clause 5 of the Lloyd's Open Form requires the salvor to notify the owners of the amount of security demanded 'immediately after the termination of the services or sooner'. Security for special compensation may be called from up to two years of the termination of services, because it may only become apparent to a salvor at a much later stage than delivery of the salved vessel to a place of safety that the salved fund is insufficient to meet its claim. The amount of security demanded is required to be reasonable, in the light of the knowledge available to the salvor at the time the demand is made. Disputes over the quantum of security are referred to the arbitrator, and until security is posted, the salvor has a maritime lien over the property salvaged. The salvor undertakes however, that it will not enforce its lien until 14 days after the termination of the services, or 'if he has reason to believe that the removal of the property is contemplated'.

A Lloyd's arbitrator's award may be taken on appeal, and the decision of the appeal arbitrator is subject, in English law, to review by the Commercial Court, and thereafter may pass through the judicial system to the House of Lords.

The time bar for salvage actions is two years from the date on which the salvage services are terminated.[201]

200 The Salvage Convention provides in Art 6(1) that the Convention 'shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication'.

201 Salvage Convention Art 23